In the Supreme Court

Sellers and Others

against

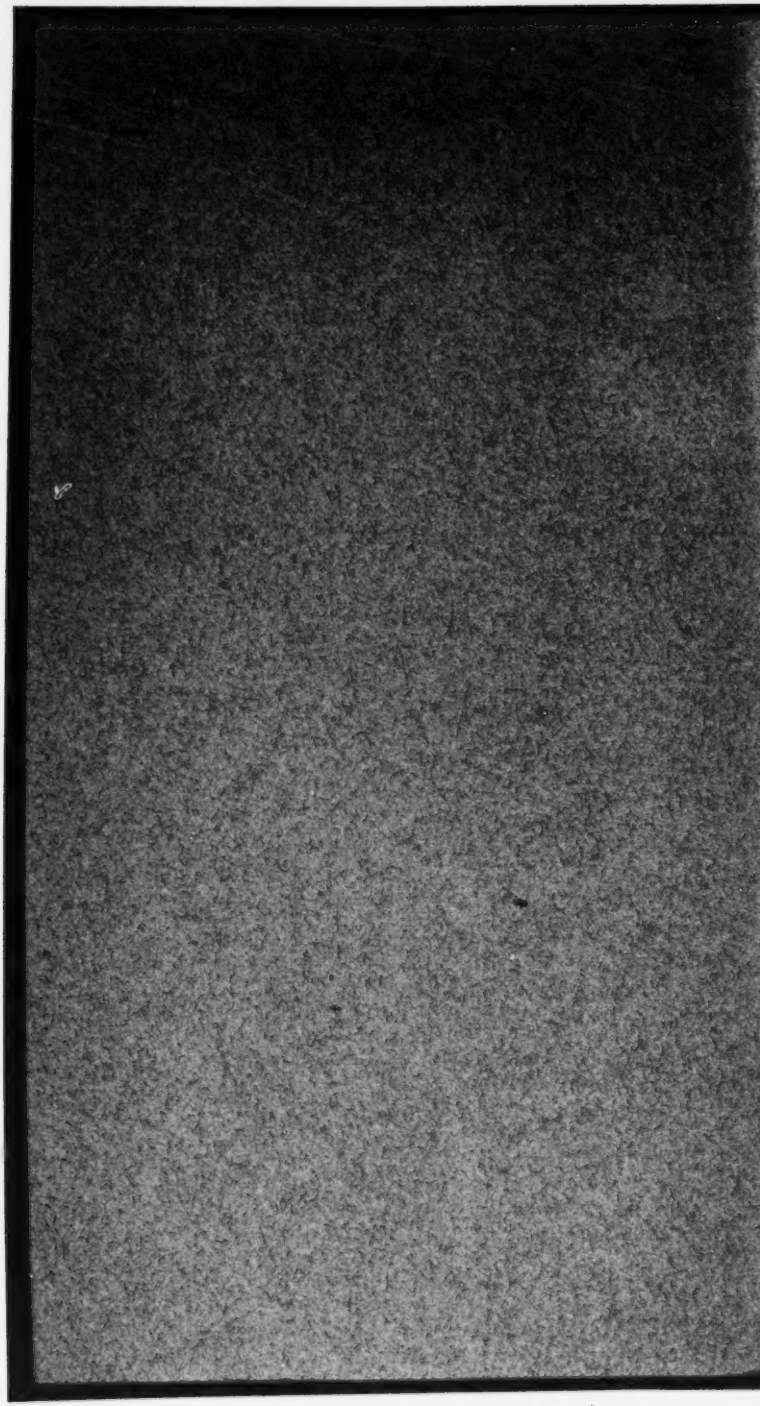
The Board of State Canvassers

Jones and Others

against

The Board of State Canvassers

BRIEF OF JOHN S. WISE ON BEHALF OF COMPLAINANT.



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IN THE

United States Supreme Court.

SELDEN and others, against THE BOARD OF STATE CANVASSERS.	In Equity on appeal from Cir. Ct. U. S. E. Dist. of Va.
JONES and others, against THE BOARD OF STATE CANVASSERS.	In Prohibition. On writ of Error from Cir. Ct. U. S. E. Dist. Va.

Brief of John S. Wise on behalf of Complainant.

Statement of the Case.

This litigation arises upon proceedings instituted by citizens of the United States, who are citizens, residents and voters of the State of Virginia, and claim that under color of certain ordinances and the alleged constitution of Virginia, ordained by a convention

which assembled June 12, 1901, in Richmond, and the schedules thereto annexed, and under a proclamation of the Governor of Virginia and certain proceedings of so-called registration boards and officers of election, they have been subjected, or caused to be subjected, to the deprivation of their rights, privileges and immunities secured by the constitution and laws of the United States and of the State of Virginia.

The two causes may be argued and decided together.

The Pleadings.

The bill in the one case, and the petition in the other, the allegations of which are to be treated as true in the form in which the cases come up, state the following causes of action:

That complainant and petitioners are voters and taxpayers of Virginia, and sue on behalf of the class they represent.

That they are, and were at the time of the committing of the grievances set forth citizens of the United States and citizens and residents of the State of Virginia, as Federal Courts are constituted.

That they are lawful voters of the State of Virginia, and, as such, entitled to vote for a Congressman for the Third District of Virginia, as the Congressional Districts of said State are now constituted, at a general election for members of the House of Representatives of the United States, which should have been held, according to law, in the State of Virginia, Tuesday, November 4th, 1902.

That they, and each of them have heretofore, for periods varying from thirty-seven to one year, been citizens, residents and lawful voters of the Common-

wealth of Virginia, under Article 3, Section 1, of the Constitution of Virginia, which was ratified by the vote of the people of that State July 6th, 1869, and under Chapter VIII, Section 62, of the Code of Virginia, of 1887, enacted by the General Assembly of Virginia, in the year 1881, (Acts 1881-2, C. 203, p. 214.)

That said Constitution became the organic law of the State of Virginia under circumstances hereinafter set forth.

That among other provisions of said constitution are the following:

> "Art. III. Elective franchise and qualifications for office.
>
> "Sec. 1. Every male citizen of the United States twenty-one years old, who shall have been a resident of this State twelve months, and of the country, city, or town in which he shall offer to vote three months next preceding any election, shall be entitled to vote for members of the General Assembly and all officers elected by the people."

The only classes of voters excluded by said constitution from exercising the right of franchise were:

1. Certain designated officers, soldiers, seamen or marines.

2. Idiots and lunatics.

3. Persons convicted of bribery in elections, embezzlement of public funds, treason, felony, or petit larceny.

4. Persons who had fought a duel or sent or accepted a challenge, &c.

> "Article XII. Future changes in the Constition.
>
> "Sec. 2. At the general election to be held in the year 1888, and in each twentieth year

> thereafter, and also at such time as the General Assembly may by law provide, the question, 'Shall there be a convention to revise the Constitution and amend the same?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such convention; provided, that no amendment or revision shall be made which shall deny or in any way impair the right of suffrage, or any civil or political right as conferred by this constitution, except for causes which apply to all persons and classes without distinction."

That complainants and petitioners having freedom and the right of suffrage guaranteed to them; by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States; by the fundamental conditions of the Act of Congress of January 26, 1870; by the Constitution of Virginia, adopted in 1869; and by the law of Virginia, of 1881, above cited; have hitherto continuously enjoyed said franchise uninterruptedly until November 4th, 1902. That they can read and write; are owners of real and personal property in Virginia; have a visible permanent interest in, and identity with, the State, in which they were born or have resided the greater portion of their lives; have committed no offense; and are colored citizens.

That in the year 1900, a political party called the Democratic party, held complete control of the executive and judicial offices of Virginia, and had a large

majority in both branches of the legislative department. That, being so in control, the Democratic majority of the General Assembly passed an act, approved March 5th, 1900, submitting to the people of Virginia the question, "Shall there be a convention to revise the Constitution and amend the same?" at a general election to be held upon the fourth Thursday in May, 1900.

That in every method and by all the representative utterances through which political parties give pledges, the Democratic party of Virginia assured the voters of Virginia that, if they voted in favor of said convention, any revised and amended constitution which might be framed thereby would be submitted to the voters of Virginia for ratification or rejection. And they verily believe and charge that a vast majority of those who voted in favor of said convention were induced thereto by these assurances, given by every representative politician, by the press and by party conventions of all political parties in the State.

That at the election held in May, 1900, the popular vote favored said convention, and was duly certified to the next General Assembly, which passed an act February 16, 1901, reciting that it was then proper to provide plans for the selection of the delegates to such convention, for the convening of said delegates and the organization of the State convention, *and for submitting the revised and amended constitution to the people of the State of Virginia for ratification or rejection.*

That said act provided for electing delegates to said convention on the fourth Thursday in May, 1901, and for the assembling of the convention June 12, 1901. It was further enacted that if the convention completed its work before October 5, 1901, the constitution framed

by it should be submitted to the qualified voters of the Commonwealth as a whole, or by separate articles or sections, as the convention might determine, for ratification or rejection, at the general election to be held November 5, 1901; and that, if the work of said convention was not finished before October 5, 1901, it should remain for the next General Assembly to enact such measures as it should deem proper, for submitting said constitution to the people of the State for ratification or rejection.

That said convention assembled June 12, 1901, and pretended to organize, but a majority of the delegates elected thereto then and there refused to take or subscribe any oath of office, in violation of Art. III, Sec. 5, of the Constitution of Virginia, which reads:

> "Sec. 5. All persons, before entering upon the discharge of any function as officers of this State must take and subscribe the following oath or affirmation:
>
> "I, ————do solemnly swear (or affirm) that I will support and maintain the Constitution of the United States, and the Constitution and laws of the State of Virginia; that I recognize and accept the civil and political equality of all men before the law, and that I will faithfully perform the duty of ———— to the best of my ability; so help me God—."

And that no members of said convention ever qualified as such.

Whereby, as complainants insist and charge, all the proceedings of said convention were null, void and of no effect.

That, nevertheless, said convention did attempt to act and did remain in session until June 26, 1902, when it adjourned *sine die*, after pretending to ordain a con-

stitution consisting of sixty-five pages of printed matter, eight pages of schedules, and twenty-four pages of registration ordinances, all of which are annexed to the bill and the petition as part thereof. marked Exhibits A, B, and C.

That, notwithstanding, the political pledges above referred to, and the requirements of the Act of Assembly aforesaid, that the work of said convention should be submitted to the voters of Virginia for ratification or rejection, a bare majority of a quorum of said convention, refused to submit the said proposed revision and amendment of the Constitution to the people of Virginia, or to leave the manner of its submission for ratification or rejection to the next General Assembly of the State.

That the convention consisted of One hundred delegates.

That the proposition to submit the amended and revised constitution to the electorate as constituted under the laws theretofore in force, was rejected by a vote of—ayes, 33; noes, 52.

That the proposition to submit it to the electorate provided for in said revised and amended constitution was rejected—ayes, 24; noes, 58.

And the proposition, "Shall the Constitution framed by this body be ordained by this convention?" was sustained by a vote of—ayes, 47; noes, 38.

That the affirmative vote by which this was accomplished was less than a majority of the whole convention.

That forty-seven members of said convention attempted; in violation of every pledge given by their party; without any constitutional or statutory authority to act definitively; in definance of the law under which they were assembled; to impose upon the voters

of Virginia, as the organic law of the State, a constitution embodying many subjects never heretofore embraced in any constitution of Virginia; never submitted to the voters of Virginia for their approval; and framed and intended to disfranchise two-fifths of the voters who elected the delegates to the convention, or as many as the appointed agents of said dominant faction should thereafter see fit to deprive of suffrage.

That the design last referred to is manifest in sundry devices inserted in said Constitution under pretense of guarding the electoral franchise, as follows:

That under the Constitution and laws of Virginia, as they existed when said convention was assembled, the lawful voters of Virginia, that is to say, every male citizen of the United States, twenty-one years of age, who had been a resident of the State of Virginia twelve months, and of the county or town in which he offered to vote, three months next preceding any election, was entitled to vote provided he was duly registered.

That the registration laws of the State of Virginia then in force, provided for a registrar in every election district of all the counties and cities of the State, who held his office for a fixed term, which had not expired when said convention attempted to enact the unlawful measures hereinafter stated. Any voter of the Commonwealth might apply to said registrars for registration, and they were required annually, in May and October, to designate a time and place at which lawful voters might be registered.

Both the complainants and the petitioners aver and charge that the dominant faction in said convention wilfully and deliberately planned to destroy the electorate fixed by the then existing constitution of Virginia, and to that end attempted to repeal the regis-

tration law above named, without submiting such action to the people, and contrary to the powers of said convention.

That after incorporating into the proposed constitution as Article I, thereof, a bill of rights, which is a mockery of the liberties recited, when contrasted with what follows it, said convention, under Article II, headed, "Elective franchise and qualifications for office," attempted to define and fix the qualifications of electors. Pretending to give a vote to every male citizen of the United States, resident in Virginia, twenty-one years of age, said section increased the term of residence of voters in the State to two years, and in the county, city or town to one year, and in the precinct where the citizen offers to vote to thirty days. To those primary qualifications it added requirements that such voters should be registered and should have paid a State tax. Superadded to these and annulling said pretended broad grant of franchise, was the requirement that there should be a new general registration in all the counties, cities and towns of the State during the years 1902 and 1903, *at such times and in such manner as might be prescribed by an ordinance of said convention.*

That, in violation of all precedent or authority, and contrary to law, the dominant faction in said convention thereupon, or shortly thereafter, passed an ordinance entitled, "to provide for the registration of voters under said Constitution and prior to the year 1904." by the provisions of which registration was ordered, not in the voting districts as provided by laws of Virginia then in force, but in the several magisterial districts of every county and in the wards of every city, thereby changing the territorial areas of registration districts and increasing the physical difficulties of registration.

It provided that said general registration should take place prior to the 15th day of October, 1902, and again prior to the 15th day of October, 1903, that the registrars should consist of a board composed of three citizens, resident in such district or ward, appointed by said convention; whereby it undertook to change the time for holding registrations, the appointing power and the number of registrars. It restrained said boards from registering any persons who applied for registration, except those *entitled to register under said Constitution prior to January 1, 1904*, and gave said boards power to administer oaths and examine under oath any applicants and witnesses; to receive evidence and hear testimony touching qualifications for registration. It further made the act of the majority of the board the act of the board itself. It provided for the delivery of the lists of persons so registered to the judges appointed at such precinct to conduct said election, and provided for the prosecution for perjury of any person examined by said boards. It gave the right of appeal to a rejected voter to the county or corporation Court, and thence to the Supreme Court of Appeals, and after sundry other detailed provisions, in order to make more effectual the plans of disfranchisement settled upon by the dominant faction, it descended to the appointment of three designated individuals in every magisterial district of the counties and in every ward of the cities in the Common wealth of Virginia, who could be relied upon as partisans of said faction to carry out its plans; whereby no one but the persons which it intended should be registered and allowed to vote would be placed upon the registration lists in any magisterial district or ward of the State of Virginia.

That with the machinery thus provided, and regis-

tration exclusively under control of its appointees, the dominent faction in said convention enacted into the Constitution itself that its appointees should only register such voters of Virginia as presented themselves to them and were citizens of the United States, having the qualifications of age and residence aforesaid and possessing the following additional qualifications:

(1) Certain soldiers; (2) any son of such soldier; (3) owners of property, upon which, for the year next preceeding that in which they offered to register, they had paid at least one dollar of State taxes; (4) persons able to read any section of said Constitution submitted to them by said officers of registration and to give a reasonable explanation of the same; or, who, if unable to read such section, were able to understand and give a reasonable explanation thereof when read to them by the officers.

That the language aforesaid, purporting to admit every male citizen of the United States, as provided in the Constitution of 1869, and entitled by the fundamental conditions of the Act of Congress to register, was a mere pretence of granting the right to register, for it was coupled with the proviso that such right should only exist when the applicant possessed the other qualifications last hereinabove named. That the Act of Congress of Jany. 26, 1870, expressly forbade the curtailment of right of suffrage in that manner. So also do the fourteenth and fifteenth amendments to the Constitution of the United States. So also does the Constitution of Virginia of 1869, and the laws enacted pursuant thereto. That the first and second conditions aforesaid were plainly obnoxious to that clause of the bill of rights, which forbids the granting of special privileges to any man or set of

men, or granting privileges as descendible for services of an ancestor.

That the third condition relating to the ownership of property on which taxes had been paid for the preceding year was likewise unconstitutional and void.

That the fourth proviso, whereby the right of any citizen to exercise his franchise in Virginia was made dependent upon the judgment or caprice of partisan appointees, violated every idea of democratic constitutional liberty.

That the autocrat of the Russian Empire has no more absolute mastery over the political forces of his empire and is no more potent to control in perpetuity the membership and organization of every representative body in his realm, or the incumbency of every office in his dominions than has the dominant faction of said convention in Virginia, if said ordinance and Constitution are valid.

That the schedule by which it was sought to put said pretended constitution into effect provided that certain lawful electoral boards existing in Virginia prior to the convening of said convention and to which electoral boards the appointment of judges of election and registration had been delegated by existing laws should remain in office until March 1, 1904, with all the powers conferred by existing laws, *except the appointment of registrars.*

That said schedule further provided that in all elections held after said pretended constitution went into effect, the qualifications of electors should be those set forth in Article II. of said pretended constitution.

That it further provided that said Constitution should go into effect on the 10th day of July, 1902, at noon, and directed the Governor of Virginia to immediately issue his proclamation, announcing that said re-

vised and amended Constitution had been ordained by the people of Virginia, assembled in convention through their representatives, as the constitution for the government of the people of the State, and that it would go into effect as such subject to the provision of said schedule on the 10th day of July, 1902, and to call upon the people of Virginia to render their true and loyal support to the same as the organic law of the Commonwealth.

That it required that when the General Assembly should convene on the 15th day of July, 1902, as it had been summoned to convene, its members and officers, before entering upon the discharge of their duties, should severally take and subscribe the oath of affirmation prescribed by section 34 of said Constitution, which was an oath to support the Constitution of the United States and the Constitution of the State of Virginia ordained by the convention which assembled in the City of Richmond on the 12th day of June, 1901.

That it further required the Governor of Virginia, and all other executive officers of the State, whose offices are at the seat of government, and all judges of courts of record, to severally take and subscribe such oath of affirmation under a penalty of vacation of their offices.

That the Governor of Virginia did forthwith make proclamation as directed by said schedule, and that the Governor of Virginia, Andrew J. Montague, and all the other executive officers of the State, whose offices are at the seat of Government, and all the Judges of Courts of Record, took and subscribed the oath required by said schedule, whereby they undertook to support the said alleged Constitution, and that the members of the General Assembly, when it assembled

on the 15th day of July, 1902, with the exception of one or two members, took and subscribed said oath.

That the passage of said ordinance creating said boards of registration; the appointments by said convention of the individuals composing said registration boards; the attempted additional qualifications upon the right of suffrage set forth in Article II., section 19, of said pretended constitution, and especially said fourth qualification; and the attempts to ordain and proclaim said constitution without submitting it to the people of the State, are each, all and every one of them in violation of the rights of complainants, destructive of complainants' franchises, ruinous to complainants' property as placing it subject to the control of a spurious and false electorate; in violation of the XIVth and XVth amendments of the Constitution of the United States; in violation of the Act of Congress of January 26, 1870; in violation of the only existing Constitution of Virginia, which was ratified by the people of Virginia July 6th, 1869, and the laws enacted pursuant thereto; and that each, all and every one of said attempted acts, ordinances, appointments, constitution and schedule are null, void and of no effect.

That by means of the premises the Governor of Virginia and all other executive officers of the State, the Judges of the Courts of Record of said State, and the members of the General Assembly of said State, have united in an attempt to abandon the government of Virginia under which they were elected to office, and that they and each of them have, in violation of their duties to the people who elected them, and in conspiracy with the dominant faction in said convention, attempted to ordain and proclaim said Constitution and to impose the same upon the people of Virginia con-

trary to their will, without giving them an opportunity to be heard, well knowing the people would never ratify the same; and that said actions and doings are in violation of the Constitution and laws of the United States and of the State of Virginia.

That many of the members of said convention, who voted in favor of ordaining and proclaiming said constitution, boldly avowed the purpose in framing the same, to disfranchise the great body of the colored voters of Virginia; and that however cunningly the devices contained in said instrument may be concealed, the real purpose of the dominant faction which framed and promulgated said so-called Constitution was to disfranchise the colored voters of Virginia on account of their race and color; a purpose which will be fully accomplished unless restrained.

That many members of the dominant faction in said convention, who voted in favor of ordaining and proclaiming said so-called Constitution, openly and boldly declared that they knew said Constitution would never be ratified and approved by the voters of Virginia, if it was submitted to them for ratification or rejection, and that, in voting to ordain and proclaim the same, they did so, knowing full well that by that means alone, if at all, could said Constitution be imposed upon the people of Virginia.

That the government of Virginia having passed, by the methods above recited, from under the lawful Constitution adopted by the people in the year 1869 to a government under said so-called Constitution, the Government now existing in Virginia is unlawful, notwithstanding many of the incumbents of office therein may have been lawfully elected to the offices which they hold.

That after the Governor of Virginia had proclaimed

said Constitution, and the other executive officers and judges of courts of record and members of the General Assembly had attorned to said so-called new Constitution, as hereinabove set forth, the registration boards appointed by the ordinance of said convention held their sessions and made up their enrollments in the various magisterial districts and wards of the Commonwealth; that in every section of the State of Virginia the action of said registration boards was as partisan and unconstitutional and outrageous as might have been expected under the circumstances of their appointment; that said boards hastened in many sections of the Commonwealth to place upon said registration rolls the names of every white male citizen of the United States resident in their respective bailiwicks possessing the qualifications of age and residence, and who was believed to be a Democrat; that the said boards made little or no effort to ask such white persons to read any section of said Constitution or to give a reasonable explanation of the same, but quickly and cheerfully admitted all such to registration; that said boards, on the contrary, only permitted colored voters to apply for registration at stated times and places, and that when such colored persons presented themselves said boards proceeded at once to ask complicated, difficult and unnecessary questions, and that, even in cases where such questions were answered intelligently, applicants for registration were rejected by said boards, which held that the answers and explanations given were not reasonable; and complainants aver that by means of the premises thousands of lawfully qualified citizens of Virginia, who applied for registration to said registration boards, have been rejected by them, and that many other thousands of voters

either refused to recognize said boards as lawfully convened, or were deterred from applying to them by their notoriously partisan and arbitrary exercise of the unconstitutional powers entrusted to them.

(Then follows in each case a statement of the particular manner in which the individual complainants in the one case, and the individual petitioners in the other case, were denied registration and opportunity to vote, under the maniplations of the local board of registration to which they applied, although they were qualified and had theretofore, for a long period, exercised the right of suffrage).

That the registration lists made up by the registration boards appointed by said convention became and were and are, not only the unlawful registration lists of the Congressional electorate of Virginia, but are, as they were intended to be by the faction which designated said registration boards, merely partisan, partial, lists of the lawful electorate, containing only such names as the appointees of said convention saw fit to enroll, and excluding therefrom lawful electors of Virginia to the number of at least 100,000 in the State, and in this Congressional district.

That under the laws passed by the Congress of the United States and lawfully enacted in Virginia prior to the assembling of said Convention of the State of Virginia, an election for Congressman from the ten Congressional districts of Virginia should have been held in the State of Virginia upon Tuesday, November the 3rd, 1902. By reason of the unlawful conspiracy aforesaid between the lawfully elected officers of Virginia and the dominant faction in said convention, and its appointees, no such election was held. That writs of election were issued by the Governor of Virginia, in the form prescribed by law, but in taking such ac-

tion he pretended to act under the Constitution unlawfully proclaimed by him as aforesaid. That Judges of election at the several voting precincts of the State of Virginia were appointed for said election by the electoral boards of their several counties and cities, but the electoral boards and judges aforesaid did not take the oath to support the lawful Constitution of Virginia, and only took the oath to support said spurious Constitution; and that whatever color of authority said electoral boards may have had to appoint said judges, by reason of their having been selected prior to the attempted proclamation of said Constitution, said attempted elections were null, void and of no effect, for the further reason that the lawfully registered voters of the Commonwealth were denied the right of suffrage, and the lawfully enrolled registration lists were excluded from said elections; and, on the contrary, the only registration lists used by said judges, or upon which any applicant for the right to exercise suffrage was permitted to vote, were spurious and unlawful registration lists made up by the illegal and partisan registration boards designated by the ordinance of said convention; whereby said elections for Representatives in Congress were conducted in violation of the laws of the State of Virginia in all respects, without the registration lists required by law; without the officers conducting same having taken the oaths required by law; and that said pretended elections were and are null, void and of no effect.

That at said election the candidates for Congress in the Third Congressional district aforesaid were as follows:

John Lamb was the candidate of the Democratic party, and Wm. E. Talley and B. W. Edwards were the candidates of the Republican party. That the

votes cast at said pretended election were not published, but whatever the said pretended returns of votes cast may be, it was a foregone conclusion before said illegal election was held, that said Democratic candidates would receive a very large vote, and said Republican candidate would receive a very small vote, because by the partisan and unlawful methods by which the registration lists were made up the Democratic voters in the district were placed upon said lists and as many Republican voters were excluded therefrom as the partisan registration boards saw fit to exclude.

That under the laws of Virginia enacted prior to the convening of said convention, and still recognized as in force by the Schedule of said Constitution, the Governor of Virginia, the Secretary of the Commonwealth, the Auditor of Public Accounts, the State Treasurer and Attorney General, or any three of them, are constituted a Board of State Canvassers. The present incumbents of these offices are as follows, to-wit:

Andrew J. Montague is the Governor of the State of Virginia.

David Q. Eggleston, Secretary of the Commonwealth.

Morton Marye, Auditor of Public Accounts.

Asher W. Harman, Jr., State Treasurer and William A. Anderson, Attorney General.

That after each election the judges of each voting precinct are required by law to make up the returns of the vote cast in their respective precincts, and transmit them to the Clerk of the County or Corporation in which the election is held. The electoral board of each county and city, when it appoints election judges, designates five of the persons so appointed to act as Commissioners, who, or any three of whom, constitute

a board, of which the Clerk of the County, Corporation or Hustings Court is ex officio clerk. That these commissioners meet at the Clerk's office of their respective Counties or Corporations on the second day (which in this case is Thursday, November 6th), after the election, and upon the precinct returns made to the Clerk's office, said Commissioners ascertain the persons who have received the greatest number of votes in the County or Corporation for the several offices to be filled at said election. The Clerk is required to make out abstracts of the votes, and said abstracts certified and signed by said Commissioners and attested by the Clerk, are deposited in the Clerk's office and certified copies thereof, under the official seal of the Clerk, are transmitted to the Secretary of the Commonwealth.

That, in the case of elections for Representatives in Congress, the Secretary of the Commonwealth, upon receipt of the certified abstracts of the votes given in the several counties and corporations constituting a Congressional district, is required to proceed to open the same and record them in a suitable book, and to preserve in his office said abstracts for the purpose of canvassing the results of elections.

That said Board of State Canvassers is required to meet at the office of the Secretary of the Commonwealth on the fourth Monday in November after the election (which in the present year is Monday, November the 24th), when, upon the certified abstracts on file in the office of the Secretary of the Commonwealth, it is required to proceed to examine and make statement of the whole number of votes given at such election for Representatives in Congress, which statement shall show the names of persons for whom such votes have been given for said office, and the whole number given

to each, distinguishing the several districts, cities and counties in which they were given. It is also required to certify the said statement to be correct and the members of said board must subscribe their names thereto, and said board is required to thereupon determine what persons have been by the greatest number of votes duly elected Congressmen from the ten several Congressional districts of Virginia, and to indorse and to subscribe on such statements a certificate of such determination, and deliver them to the Secretary of the Commonwealth. That the Secretary of the Commonwealth is required to record in a suitable book each certified statement or determination as made by the Board of State Canvassers, and without delay make out and transmit to each of the persons thereby declared to be elected a certificate of his election certified by him under his seal of office.

That each, all and every one of the proceedings had and taken by the Governor of Virginia, the Secretary of the Commonwealth, the several electoral boards in the State of Virginia, the Judges and Clerks of election, and all the other officers, to whom duties concerning elections are committed by the laws of Virginia, have, in so far as they relate to the election required by law to be held in the State of Virginia November 3, 1902, for Representatives in Congress of the United States, been null, void and of no effect; that each, all and every one of said proceedings have been contrary to the law, in violation of complainants' rights, and unconstitutional; and that no election for Representatives in Congress was held in the State of Virginia November 3, 1902.

That complainants and petitioners are advised that the judges of election appointed in and for the several election precincts in all the Congressional districts of

Virginia did pretend to hold such an election November 3rd, 1902; that said precinct judges did certify to the Clerks of their respective counties the votes which were cast thereat on the day aforesaid; that the Boards of Canvassers in the several counties and cities in said several Congressional districts did assemble at their respective court houses upon the 6th day of November, 1902, and did certify abstracts of the votes cast in their counties and cities respectively to the Secretary of the Commonwealth at Richmond, Virginia, and that said Board of State Canvassers will assemble at the capital upon the 24th day of November, 1902, and will, then and there, unless restrained from so doing, proceed to treat said pretended election as if it were a lawful election, and will from the spurious certified abstracts on file in the office of the Secretary of the Commonwealth proceed to examine and make up statements of the whole number of votes given at said spurious election for Representatives in Congress, and to certify such statements to be correct, and to subscribe their names thereto, and to determine what persons had been by the greatest number of votes duly elected to such offices, and to endorse and subscribe on such statement a certificate of such determination and to deliver them to the Secretary of the Commonwealth; and that said Secretary of the Commonwealth will, unless restrained from so doing, record said certified statement of determination, and without delay make out and transmit to each of the persons thereby declared to be elected a false and spurious certificate of his election as a representative in Congress certified by him under his seal of office.

That such action on the part of said Board of State Canvassers would do the complainants and petitioners great and irreparable injury; that the injury to them is

great because the action of said Board of State Canvassers, if permitted to be taken, will give effect, as laws, to enactments, proclamations and proceedings, which control and govern the persons and the property, the liberties, the franchises and immunities, of complainants, which enactments, proclamations and proceedings have never been and are not valid or binding upon complainants, or upon any citizens of Virginia. That said injury is irreparable because it is of such a character that, unless it is restrained it can never be repaired. That they are freemen and voters and taxpayers in their community, and the damage done to them by these spurious and invalid proceedings, which deprive them of their franchises, take away the liberty guaranteed to them by the Constitution of the United States, and give them no voice in the government which taxes them, is an injury which is irreparable even if it should be permitted to exist for a single minute.

THE PRAYER OF THE COMPLAINANTS IN THE BILL WAS AS FOLLOWS:

Forasmuch as complainants are remediless in the premises, save in a Court of Equity, wherein such matters as are hereinabove set forth are properly cognizable and relievable, therefore complainants pray that Andrew J. Montague, the Governor of Virginia, David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., State Treasurer of Virginia, and William A. Anderson, Attorney General of Virginia, constituting the Board of State Canvassers as defined in the Code of Virginia, 1887, section 139, be made parties defendant to this bill and duly summoned to answer the same; that this Honor-

able Court shall examine into and determine whether the said pretended Constitution of Virginia, passed by the Convention which assembled at Richmond on July 12th, 1901, and the schedule thereto annexed, and the ordinance passed by said convention entitled, "An Ordinance to Provide for the Registration of Voters Under This Convention Prior to the Year 1904," and the proclamation of the Governor of Virginia based thereon, and the subsequent proceedings of the Executive, Judicial and Legislative Departments of Virginia, based thereon, or any of them, are or ever have been lawfully enacted, or have become obligatory and binding upon the people of Virginia; and whether, even if said Constitution, schedule and ordinance were enacted according to the forms of law, they are not, nevertheless, null, void and of no effect, as contrary to the Constitution and laws of the United States. That this Honorable Court having decided that the said laws are null, void and of no effect, and that any election held under them is likewise void, will perpetually restrain and enjoin said State Board of Canvassers and each and every member thereof from considering or passing upon the returns of said pretended election held November the 4th, 1902, in the State of Virginia for Representatives in Congress, the same not having been held in accordance with law and being null, void and of no effect; and that the said Board of State Canvassers be perpetually restrained from passing upon said returns; and that the Secretary of the Commonwealth be perpetually restrained and enjoined from making out or transmitting to any of the persons who were candidates for election for the House of Representatives of the United States at a pretended election held in Virginia November 4th, 1902, any certificate of election certified by him under his seal of office;

and inasmuch as the final determination of said questions by his Honorable Court may be delayed beyond the 24th day of November, 1902, complainants pray for a restraining order against said Board of State Canvassers, and each and every member thereof, in the nature of a temporary injunction, forbidding them and each of them from taking any proceedings whatsoever upon the certified abstracts of returns of said election in the office of the Secretary of Commonwealth of Virginia, until the further order of this court can be had in this cause. And for all such other, further and general relief in the premises as to equity and your Honor may seem meet and proper under the circumstances.

AND THE PRAYER OF THE PETITIONERS FOR THE WRIT OF PROHIBITION WAS AS FOLLOWS:

Wherefore your petitioners pray that this Horonable Court will issue or cause to be issued a writ of prohibition, directed to and against said Andrew J. Montague, who is Governor of Virginia; David Q. Eggleston, who is Secretary of the Commonwealth of Virginia; Morton Marye, who is Auditor of Public Accounts of Virginia; Asher W. Harmon, Jr., who is State Treasurer of Virginia, and William A. Anderson, who is Attorney-General of Virginia, constituting the Board of State Convassers of Virginia, prohibiting them, and each of them, from considering, canvassing, counting, determining upon, or certifying or otherwise acting upon, any returns or abstracts of returns in the office of the Secretary of the Commonwealth of Virginia, purporting to be returns of election held in the State of Virginia, Tuesday, November 4th, 1902, for representatives in Congress from the State of Virginia, or in any wise dealing with or certifying

the results of said returns as returns of a lawful election held in Virginia on the date aforesaid. That by reason of the matters and things hereinabove set forth, said pretended election, and any and all precinct, county, district or State returns made thereunder, may be held to be null, void and of no effect, and said Board of State Canvassers, and the members thereof, may be prohibited from in any wise proceeding to act upon the same as lawfully before them for their consideration.

That pending the hearing, and until the final decision upon this petition for said writ of prohibition an order may be granted by this Honorable Court suspending any and all proceedings, on the part of said Board of State Canvassers and the members thereof, upon any and all the matters sought to be prohibited until the final decision of this cause. And for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual.

And petitioners will ever pray, &c.

Upon the above State of the law, facts, and pleadings, the two causes came on to be heard together at Richmond, Virginia, November 28th, 1902, before Fuller C. J. and Waddill J. and after argument by counsel, upon the motion of the complainants for an injunction, and of the petitioners for a writ of prohibition, both applications were denied, and both causes were dismissed, with costs, November 28th.

The memoranda, on which the decree and order were entered are as follows:

Memoranda of Chief Justice Fuller.

Equity Case—"The rule heretofore granted herein will be discharged, and the application denied, because of want of jurisdiction.

"The application is, in effect, against the Commonwealth, and the subject matter is political.

"That a Court of Equity has no jurisdiction, as such in cases within which this case falls, settled in this Circuit in Green vs. Mills, 69 Fed., 852."

Prohibition Case—"Application for prohibition, prohibiting defendants from canvassing returns of the election held November 4, 1902, for representatives in Congress, or proceeding to act on the same, and for preliminary order suspending proceedings on the part of the State Board of Canvassers. The rule heretofore entered herein is discharged, and preliminary order denied. This for want of jurisdiction. The writ is not sought in aid of jurisdiction already acquired; nor does it appear that there is no other remedy.

"The proceeding is, in effect, against the Commonwealth, which is in any view an indispensable party, and cannot be made such, and the matter being political, cannot be disposed of in such a proceeding."

Memorandum of Waddill J., applicable to both cases.

"Believing under the decisions of the courts of the United States, by which this Court is, and should be governed, that neither of the actions now before the Court can be maintained, I, for that reason concur in the result arrived at by the Chief Justice, dismissing the same, and may hereafter file a brief memorandum in writing, embodying my views.

"It is, in frankness, due however, that I should say that while I believe that this is the law, as settled by the decisions, it does not entirely embody my personal views as to what that law ought to be. I can but believe that as to rights, arising under, and guaranteed to the citizen by the constitution and laws of the United States, injuriously affecting one hundred thousand peo-

ple, whether respecting their property or their personal and political rights, and particularly the two latter classes, that they ought to be given a day in Court; afforded an opportunity for a full and speedy hearing; and to that end, that technicalities, forms and ceremonies should, in large measure, be dispensed with, speedy justice afforded, and the rights of the respective parties litigant ascertained."

The following are the extracts from the alleged Virginia Constitution, and Schedule, referred to in the pleadings and argument:

"Whereas, pursuant to an act of the General Assembly of Virginia, approved March the fifth, in the year of our Lord, nineteen hundred, the question, "shall there be a convention to revise the Constitution and amend the same?" was submitted to the electors of the State of Virginia, qualified to vote for members of the General Assembly, at an election held throughout the State on the fourth Thursday in May, in the year nineteen hundred, at which election a majority of the electors so qualified voting at said election did decide in favor of a convention for such purpose; and

"Whereas, the General Assembly at its next session did provide by law for the election of delegates to such convention, in pursuance whereof the members of this Convention were elected by the good people of Virginia, to meet in convention for such purpose,

"We, therefore, the people of Virginia, so assembled in Convention through our representatives, with gratitude to God for His past favors, and invoking His blessings upon the result of our deliberations, do ordain and establish the following revised and amended Constitution for the government of the Commonwealth.

ARTICLE I.

Bill of Rights.

A DECLARATION OF RIGHTS, made by the representatives of the good people of Virginia assembled in full and free Convention; which rights do pertain to them and their posterity, as the Basis and Foundation of Government.

Section 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.

Sec. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

Sec. 3. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; of all the various modes and forms of government, that is best, which is capable of producing the greater degree of happiness and safety and is most effectually secured against the danger of maladministration; and, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

Sec. 4. That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator or judge to be hereditary.

Sec. 5. That the legislative, executive and judicial departments of the State should be separate and distinct; and that the members thereof may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the va-

cancies be supplied by regular elections, in which all or any part of the former members shall be again eligible, or ineligible, as the laws may direct.

Sec. 6. That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.

Sec. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

Sec. 8. That no man shall be deprived of his life, or liberty, except by the law of the land, or the judgment of his peers;

* * * * * *

ARTICLE II.

Elective Franchise and Qualifications for Office.

Sec. 18. Every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city or town one year, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his state poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elected by the people; but removal from one

precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

Sec. 19. There shall be general registrations in the counties, cities and towns of the State during the years nineteen hundred and two and nineteen hundred and three at such times and in such manner as may be prescribed by an ordinance of this Convention. At such registrations every male citizen of the United States having the qualifications of age and residence required in Section Eighteen shall be entitled to register, if he be:

First. A person who, prior to the adoption of this Constitution, served in time of war in the army or navy of the United States, of the Confederate States, or of any State of the United States or of the Confederate States; or

Second. A son of any such person; or

Third. A person, who owns property, upon which, for the year next preceding that in which he offers to register, state taxes aggregating at least one dollar, have been paid; or

Fourth. A person able to read any section of this Constitution, submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

A roll containing the names of all persons thus registered, sworn to and certified by the officers of registration, shall be filed, for record and preservation, in the clerk's office of the circuit court of the county, or the clerk's office of the corporation court of the city, as the case may be. Persons thus enrolled shall not be

required to register again, unless they shall have ceased to be residents of the State, or become disqualified by section Twenty-three. Any person denied registration under this section shall have the right of appeal to the circuit court of his county, or the corporation court of his city, or to the judge thereof in vacation.

Sec. 20. After the first day of January, nineteen hundred and four, every male citizen of the United States, having the qualifications of age and residence required in section Eighteen, shall be entitled to register, provided:

First. That he has personally paid to the proper officer all state poll taxes assessed or assessable against him, under this or the former Constitution, for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; and

Second. That, unless physically unable, he make application to register in his own hand-writing, without aid, suggestion or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted, and, if so, the state, county and precinct in which he voted last; and,

Third. That he answer on oath any and all questions affecting his qualifications as an elector, submitted to him by the officers of registration, which questions, and his answers thereto, shall be reduced to writing, certified by the said officers, and preserved as a part of their official records.

Sec. 21. Any person registered under either of the

last two sections, shall have the right to vote for members of the General Assembly and all officers elective by the people, subject to the following conditions:

That he, unless exempted by section Twenty-two, shall, as a prerequisite to the right to vote after the first day of January, nineteen hundred and four, personally pay, at least six months prior to the election, all state poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote; provided that, if he register after the first day of January, nineteen hundred and four, he shall, unless physically unable, prepare and deposit his ballot without aid, on such printed form as the law may prescribe; but any voter registered prior to that date may be aided in the preparation of his ballot by such officer of election as he himself may designate.

Sec. 22. No person who, during the late war between the States, served in the army or navy of the United States, or the Confederate States, or any State of the United States, or of the Confederate States, shall a any time be required to pay a poll tax as a prerequisite to the right to register or vote. The collection of the state poll tax assessed against any one shall not be enforced by legal process until the same has become three years past due.

Sec. 23. The following persons shall be excluded from registering and voting: Idiots, insane persons, and paupers; persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money

or property under false pretences, embezzlement, forgery or perjury; persons who, while citizens of this State, after the adoption of this Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such duel, either within or without this State, or knowingly conveyed a challenge, or aided or assisted in any way in the fighting of such duel.

Schedule.

That no inconvenience may arise from the adoption of this Constitution, and in order to provide for carrying it into complete operation, it is hereby ordained that:

Section 1. The common law and the statute laws in force at the time this Constitution goes into effect, so far as not repugnant thereto or repealed thereby, shall remain in force until they expire by their own limitation, or are altered or repealed by the General Assembly.

Sec. 2. All ordinances adopted by this Convention, and appended to the official original draft of the Constitution delivered to the Secretary of the Commonwealth, shall have the same force and effect, as if they were parts of this Constitution.

* * * * *

Sec. 22. When the General Assembly convenes on the fifteenth day of July, nineteen hundred and two, its members and officers, before entering upon the discharge of their duties shall severally take and subscribe the oath of affirmation prescribed by Section Thirty-four of the Constitution. And not later than the twentieth day of July, nineteen hundred and two, the Governor and all other executive officers of the State, whose officers are at the seat of Government, and all judges of courts of record, shall severally take and subscribe such oath or affirmation; and upon the failure of any such officer, executive or judicial, to take such oath by the day named, his office shall thereby become vacant. Such oaths or affirmations shall be taken and subscribed before any person authorized by existing laws to administer an oath. The Secretary

of the Commonwealth shall cause to be printed the necessary blanks for carrying into effect this provision, and the said oaths and affirmations so taken and subscribed, except of the members and officers of the General Assembly, shall be returned to and filed in his office; and those taken by the members and officers of the General Assembly shall be preserved in the records of the respective houses.

Sec. 23. The official copy of the Constitution and Schedule, and of any ordinance adopted by the Convention, shall, as soon as they shall be enrolled, be signed by the President, and attested by the Secretary of the Convention, and the President will thereupon cause the same to be delivered to the Secretary of the Commonwealth, who will file and preserve the same securely, among the archives of the State in his custody.

* * * * *

The Secretary of the Commonwealth will immediately upon the adoption of this Schedule, deliver a certified copy of the Constitution and Schedule, and of said ordinance, to the Governor of the Commonwealth.

Sec. 24. The Governor is authorized and directed to immediately issue his proclamation announcing that this revised and amended Constitution has been ordained by the people of Virginia, assembled in Convention, through their representatives, as the Constitution for the government of the people of the State, and will go into effect as such, subject to the provisions of the Schedule annexed thereto, on the tenth day of July, nineteen hundred and two, at noon, and calling upon all the people of Virginia to render their true and loyal support to the same, as the organic law of the Commonwealth.

Sec. 25. This Constitution shall, except as is otherwise provided in the Schedule, go into effect on the tenth day of July, nineten hundred and two, at noon.

This Schedule shall take effect from its passage.

ON THE JURISDICTION.

THE COURT ERRED IN ALL ITS HOLDINGS.

The Federal Statutes under which these Proceedings are Instituted.

The statutes under which the complainants, in the one case, and petitioners in the other case, claim the right to proceed in the Federal Court for the redress of their grievances are

Revised Statutes of the United Title XXIV—Civil Rights.

> SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usuage of any State or Territory, *subjects, or causes to be subjected, any citizen* of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges or immunities secured by the constitution and laws*, shall be liable to the party injured in an *action at law suit in equity, or other proper proceeding for redress.*

And Section 629, of the Revised Statutes of the United States, Paragraphs Twelfth and Sixteenth, conferring jurisdiction upon the Circuit Court as follows:

> SEC. 629. The Circuit Courts shall have original jurisdiction as follows:
>
> * * * * * * * * * *
>
> Twelfth. Of all suits brought by any person * * * to enforce the rights of citizens of the United States to vote in the several States.
>
> * * * * * * * * * *

> Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom, or usage of any State, or any right, privilege or immunity secured by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

The right to proceed for the redress of their grievances, either by suit in equity, or by petition for a writ of prohibition, is conferred upon the complainants by the express language of Section 1979, of the Revised Statutes, if prohibition is a "proper proceeding for redress."

The forms of procedure in the equity cause are prescribed by the equity rules promolugated by the Supreme Court.

The forms and modes of procedure upon the petition for the writ of prohibition are conformable to the practice and pleadings existing in like causes in the Courts of record of the State of Virginia, as provided by the Revised Statues, as follows:

> SEC. 722. The jurisdiction in civil * * * matters conferred on the * * * * * * * * * Circuit Courts by the provisions of * * * * * Title "Civil Rights" * * * * * * for the protection of all persons in the United States in their Civil Rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but *in all cases where they are not adapted to the object, or*

are deficient in the provisions necesary to furnish suitable remedies * * * * * * *the common law, as modified and changed by the constitution and statutes of the State wherein the Court having jurisdiction of such civil* * * * *cause is held,* so far as the same is not inconsistent with the constitution and laws of the United States, *shall be extended to and govern the said Courts in the trial and disposition of the cause.*

CONCERNING THE NATURE OF THESE PARTICULAR SUITS.

These are not suits to test any claim of rival governments existing in Virginia.

But one government exists in Virginia. Every officer in the State, whose title or conduct is involved in this litigation, except the members of the Registration Boards, is a lawfully elected officer of the State under the constitution of Virginia, ratified by the people July 6, 1869, either for a term of office, not yet expired, or is continuing in office by virtue of an extension created by the alleged new constitution; or, if that extension be not lawfully enacted, he is holding on to his office until his successor shall be elected and qualified as provided by the old constitution.

The legal questions in the cases arise from the fact that a so-called convention sat in Virginia in 1901-2, and enacted certain ordinances, ordained a constitution and schedules, declared its work to be the organic law of the State as of July 10, 1902, and adjourned, claiming that its work was lawful; and the persons holding the executive, legislative and judicial

offices of the State accepted the same as lawful; have taken an oath to support the constitution, ordinances and schedules so ordained; have, in all respects, attorned to this alleged new organic law; and have attempted to impose upon the people of Virginia, the government ordained by said convention.

If the steps taken by the convention and the office-holders of Virginia to bring about this result, have been lawfully taken, and are constitutional, the complainants and petitioners have no case.

If, on the other hand, these steps were unlawful, the case is one of the most anomalous ever seen in the history of constitutional government. It is the organized, unanimous effort of lawfully elected officers of a State, to destroy the organic chart of government under which they were elected and to which they took an oath of allegiance; and, in violation of plighted faith, not only to transfer their own allegiance, but that of their constituents, to a new and entirely different chart of government, without giving those constituents any opportunity to approve or to reject their action.

There is no other legal phrase to describe such an attempt, except the term "conspiracy."

The conspirators are:

1st The members of the convention, who sought to pass the registration ordinance and ordain this constitution without authority.

2nd. Their appointees, who, as members of registration boards, have aided in carrying out their plans.

3rd. The Legislative, Executive and Judicial officers of the State of Virginia who have attorned to the supremacy of this spurious constitution, by taking oaths to support it under threat that their offices would be vacated if they did not.

A "conspiracy" consists of a combination of persons for the purpose of accomplishing an unlawful object, or to accomplish a lawful object by unlawful means.

The most succinct definition of "conspiracy" extant is perhaps that given by Judge Colt in Commonwealth v. Waterman, 122 Mass. 57, as "the combination of two or more to do something unlawful, either as a means or as the ultimate end."

Either of these definitions fits the conduct of those now in charge of the government of Virginia.

They have deliberately attempted, without original authority or subsequent sanction from the people of Virginia, to raise a strange flag upon the ship of State.

Selected and placed in charge of a craft which was flying the flag and manned and equipped by one government; they started upon a cruise and then without the sanction of masters or owners, raised a new ensign; returned to port with it nailed to the masthead; and threatened to bombard their own capital unless their masters took oaths of allegiance to their new *regime*.

There are ugly names for mariners like this upon the high seas.

HISTORICAL FACTS PERTAINING TO THE POWERS, DUTIES AND ACTIONS OF THE VIRGINIA STATE CONVENTION.

Virginia was one of the thirteen original States, which framed the constitution of the United States.

She was an independent sovereign State, beyond all question, after her independence was acknowledged by Great Britian.

But when she ratified the Federal Constitution she subscribed the Sixth Article of the Constitution, which declares:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be *the supreme Law of the Land*; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

When, therefore, we speak of the sovereignty of Virginia we speak, not of her independent sovereignty, as it existed when it was acknowledged by Great Britain, but of that sovereignty as qualified by her subsequent voluntary acknowledgement of the supreme sovereignty of the United States.

This qualified nature of her own sovereignty was pointed out to her at any early date by her immortal son John Marshall in the cases of *Marbury vs. Madison,* 1st Cranch, 137; and *Cohens vs. Virginia,* 6 Wheaton, 264, and no sane man, at all familiar with the history of the adoption of the Federal Constitution has questioned it since, so long as she is admitted to be a member of the Union.

For nearly a century the right of Virginia, as a sovereign State, to withdraw from the Federal Government was subject of doubtful and ofttimes angry debate.

In the year 1861, she proclaimed a dissolution of the bonds of Union and passed an ordinance of secession. She passed that ordinance of secession by delegates as solemnly summoned and by a convention as formally constituted, as any ever assembled, and the action of the convention was ratified by a large majority of her people.

The Federal Government denied her right to secede. It inaugurated a war against Virginia and her asso-

ciates. It declared that it prosecuted that war, not for conquest or subjugation, but for self-preservation, and to compel Virginia and her associate States to recognize the supreme, irrevocable authority of the Federal Constitution.

The people of Virginia, with practical unanimity, resisted the assault; levied an army, and waged a war of four years' duration against the supremacy of the Union.

Virginia, allied with other States, under the name of the Confederate States of America, resisted the authority of the United States for four years, during which period her government was in armed hostility to that of the United States, and, as time passed, and elections occurred, every officer of the Civil government of Virginia became one elected as an enemy of the United States, and upon entering into his office, took an oath to support the enemies of the United States.

Thus when the war ended the civil, as well as the military government of Virginia was an inimical government, installed while war with the United States was flagrant.

In April, 1865, the armies of the Confederate States were conquered by the armies of the Union, and dispersed to their homes.

The armies of the Union occupied the capital and all the territory of Virginia.

The civil government of Virginia fled.

From that time forth, until the year 1870, the only government existing in Virginia was a government of military occupation by the armies of the United States. Temporary, improvised, civil governments, such as Congress saw fit to provide from time to time, subordi-

nate to the military government, were the only semblance of civil government existing in Virginia.

The United States, having reduced the people of Virginia, by force of arms, to subjection to the authority of the United States, and to the acknowledgement of its supremacy, Congress, notwithstanding the tremendous force which the nation had employed to overwhelm the will of the people of the State upon the question of secession, proceeded thenceforth upon the theory that the States were not destroyed. It repeatedly declared that the States, so far as was consistent with the acts done to maintain the supremacy of the Union and to exact the allegiance of the people to the Union, as the supreme law, should be restored to their former condition as members of the Union.

Congress declared its recognition of the obligation and duty under the Fourth Section of the Fourth Article of the Constitution of the United States, to guarantee a Republican form of government to the States lately in arms against the government; and upon that theory it began a series of acts known as the Reconstruction Acts. The leading authorities upon this legislation are "Essays upon the Civil War and Reconstruction," by Professor Dunning, of Columbia University, New York; McPherson's History of Reconstruction; Lalor's Encyclopedia of Political Science, Vol. 3, p. 540 to 556; Blaine's Twenty Years of Congress; Jamieson on Constitutional Conventions and Von Holst.

Even before the termination of the war consideration of the status of the so-called rebellious States, when they should be subdued, arose and was discussed in Congress.

The first reconstruction measure was enacted by the

House of Representatives, May 4, 1864. It authorized the appointment of provisional governors for the rebel States, when they should be conquered; the enrollment of all *white* male citizens; the right to such as took the oath to elect delegates to conventions to restablish the State governments; required those conventions to adopt constitutions disqualifying all civil or military officers in the rebellious power; prohibited involuntary servitude; and demanded repudiation of confederate debts; it provided for the certification of such constitutions by the provisional governors to the President, and authorized the election of Senators, Representatives and Electors when the President, after obtaining the consent of Congress, should proclaim such governments.

Mr. Lincoln failed to sign the bill, because it was received less than an hour before final adjournment, but in his proclamation of July 8, 1864, he indicated his general approval of the plan (13 Stat. at Large, p. 744).

It will thus be seen that at the very outset of legislation on this subject the plans for restoring the insurgent States to their places in the Union, embraced the imposition of conditions and the withholding of such restoration until those conditions had been accepted by the States. And no other plan ever proposed in the Federal Congress omitted these conditions as one of the indispensable prerequisites of recognition.

Without going into the details of all the reconstruction measures, suffice it to say that by joint resolution of Congress (13 Stat. at Large, pp. 567-568), the insurgent States were declared not entitled to representation in the electoral college for the term of office commencing March 4, 1865. (See McPherson's Political History of the Rebellion, Appendix, pp. 577-579).

Electoral votes offered by Louisiana and Tennessee predicated on the election of 1864, were rejected under this law.

Congress proceeded consistently upon the theory that the States must be "reconstructed," before they could be restored to their rights in the electoral college.

The reasons for this demand by the Federal Government were as follows:

(1) Unless the reorganized governments of the States, lately insurgent, abandoned forever the doctrine of secession, the war had been fought in vain.

(2) As a war measure, the slaves of the Southern States had been emancipated, and not only was the triumphant North resolved that the conquered South should recognize this emancipation, but it was further firmly convinced that, to make that emancipation effectual, the late slaves should be endowed with citizenship and franchise in order to protect themselves.

The Southern States, to a certain extent, unwisely provoked such legislation by sundry statutes which they passed. (See Dunnings Essays, p. 74 to 92; Blaine's Twenty Years of Congress, p. 93 to 107).

(3) The North was resolved that the Southern States should repudiate all Confederate debts.

The debates in the 39th and 40th Congress, extending from 1865 to 1868, give in full the Northern view of the essential requisites of the reconstruction acts. Shellabarger, Stevens, Morton, Sumner and Fessenden were among the leading orators and framers of the legislation; and the keynote of all the debates and laws formulated was that the United States was bound by the Constitution to guarantee to each State a Republican form of government; that the "guarantee" was collateral to the primary obligation of the State to provide such govern-

ments for themselves, and that if the States failed to provide and to maintain them, then the United States, as the guarantor, must provide and maintain them, and might, if it deemed it necessary, bestow the right of suffrage upon such persons as it saw fit.

Tennessee was the first State restored to her representation in Congress by a general resolution passed July 24, 1866, she having adopted a satisfactory constitution. This was doubtless largely through the influence of her citizen Andrew Johnson, then President of the United States. (14 Stat. at L. 364.)

The first general act providing for the government of the rebel States was passed March 2, 1867. (14 Stat. at L. 428.) It declared that no legal State government existed in certain enumerated insurgent States including Virginia. It divided the States into military districts, to be ruled and commanded by army officers.—Virginia was designated as District No. I. By the Fifth Section of the law, it declared that when the people of any one of the States named should present a constitution,

> "Framed by a convention of delegates, elected by the *male citizens* of said State, twenty-one years, and upward, *of whatever race, color or previous condition,* who have been residents of said State for one year previous to the date of election, with certain exceptions, *and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated* for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of the ratification * * * and when such constitution shall have been submitted to Congress for ex-

amination and approval, and Congress shall have approved the same, and when said State, by a vote of its Legislature, elected under the said constitution, shall have adopted the amendment to the constitution of the United States proposed by the 39th Congress and known as Article XIV * * * said State shall be declared to have a representation in Congress, and Senators and Representatives shall be admitted therefrom on their taking the oath prescribed by law."

Thus we see that the right of the people of Virginia, even to hold a convention and frame a constitution after her conquest by the Federal Government, was based at the very outset, upon the condition that the delegates should be elected by male citizens of the State twenty-one years and upwards. of whatever race, color or previous condition, and upon the further express condition that the constitution should provide an elective franchise to be enjoyed by all such persons.

A supplementary act passed in March, 1867,, (15 Stat. at L. p. 2) provided for the registration of qualified voters under the supervision of the commanding general, and for the holding of elections by such registered voters, etc., and Congress expressly reserved power to pass upon and approve the Constitution adopted before it should become operative. All registered and qualified electors had opportunity to vote freely and without restraint.

Other amendments of the law were passed July 19, 1867, (15 Stat. at L. p. 14). They related to the true intent of the act; the powers of military commanders, and provisions for registration.

June 22, 1868. Arkansas was declared entitled to

admission, but upon the "fundamental condition" that her constitution should never be changed so as to deprive any citizen, or class of citizens of the United States, of the right to vote, who were entitled to vote by the constitution then recognized. (15 Stat. at L. p. 72).

June 25, 1868, North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida were admitted to representation upon the same "fundamental condition;" and not until April 10, 1869, did Congress authorize the submission of the constitutions of Virginia, Mississippi and Texas to the vote of the people. (16 Stat. at L. p. 40.)

How Virginia was Re-Admitted.

When the bill allowing the people of Virginia to vote upon the proposed constitution came up in the Senate, after having passed the House, it was debated April 9th, 1869. (See Congressional Globe & Appendix, 1st Session, 41st Congress, p. 653.)

To the bill as it had passed the House, Senator Morton offered an additional section requiring the Legislature of the State to ratify Amendment XV to the Constitution before she should be admitted. To that Senator Trumbull objected. In the course of the debate Senator Morton said:

> "We have already required these States, as a condition that they shall put universal suffrage in their State Constitutions; and if they propose to accept that in good faith in their State Constitutions, what objection can they have to putting it into the Constitution of the United States? None whatever. If they shall object to putting it into the Constitution of the

United States, it will be because they do not accept it in good faith in their State Constitutions and are relying upon re-modeling their State Constitutions and the depriving the colored man of the right of suffrage."

Much more to the same effect was said in the debate and the section was added requiring the legislatures of the States to ratify the XVth Amendment.

The act was passed April 10th, 1869.

(Cong. Globe, 41 Cong., 1st Session, Appendix 49.)

The provisions were as follows: Section 1, authorized the President, at such time as he might deem best, to submit the constitution which was framed by the convention which met in Richmond, Virginia, December 3, 1867, to voters of the State, and permitted the President to submit to a separate vote such provisions as he might deem best.

Section 2, permitted the voters at the same election to vote for and elect members of the General Assembly, and all officers and members of Congress. The election was to be held and returns made under the act of Congress.

Sections 3 and 4, related to Texas and Mississippi.

Section 5, provided that, if the constitution was ratified, the legislature should assemble at the Capitol on the fourth Tuesday after promulgation of the ratification by the military officer commanding the State.

Section 6, provided that before Virginia should be admitted to representation in Congress, the legislature should ratify the XVth Amendment.

Section 7, provided that the proceedings were not to be deemed final until the action of the State authorities was approved by Congress.

Under the act of April 10, 1869, the constitution of

Virginia, was voted on for ratification or rejection, July 6, 1869. The popular vote was 210,000. It was nearly or quite as large as the vote cast in the gubernatorial election of 1881, between Cameron and Daniel, twelve years later. Of the popular vote cast 201,000 voted in favor of the constitution, and it was ratified in a campaign of great enthusiasm. Gilbert C. Walker was elected governor, and the legislature was likewise elected.

In the month of October, 1869, the legislature met, ratified the XV Amendment, and the XIV Amendment, and adjourned October 26th, to meet again on the second Tuesday after Congress should approve the action of the people of Virginia in the late election. (Acts 1869-70, p. 1-3.)

Hon. Zeph. Turner was elected speaker of the House.

The commanding general certified the constitution, as adopted, to the President who informed the Congress of the United States of the result.

The question of the readmission of Virginia led to a long and spirited debate in Congress. The constitution of Virginia itself provided, Article XII, Sec. 2, on the subject of amendments:

> "That no amendment or revision shall be made which shall deny or in any way impair the right of suffrage or any civil or political right as confered by this constitution except for causes which apply to all persons and classes without distinction."

The act to admit Virginia to representation was reported without condition, but was opposed in the Senate by Senator Thayer of Nebraska. (Congress. Globe, Part 7, Appendix, 2nd Ses., 41st Congress, pp. 69-71.)

In the course of his remarks Senator Thayer pointed out that when the States of North Carolina, South Carolina, Georgia, Louisiana, Alabama, Arkansas and Florida were admitted under the act of June 25, 1868, they had been admitted upon the fundamental condition that their constitutions should never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said States, who were entitled to vote by the constitutions then recognized, and he asked the question:

> "Why, I ask the Senator from Nevada, and those who are acting with him, do you refuse now, two years later, to apply the same condition and require the same pledge from the State of Virginia? What has she done to entitle her to this immunity? What will be the inferences to be drawn by Virginia on the refusal of Congress to require this same pledge? It must inevitably be that she may do with impunity that which you required Georgia to pledge herself she would not do; because you do not require the same pledge from Virginia; and judging by the past we have abundant reason for believing that she will make use of the privilege that we thus give her."

Further urging the conditions, he said (p. 71):

> "We have solemnly promised to the faithful people of Virginia that they shall have the equal protection of the law and the blessings of good government. I appeal to every Republican Senator in this presence today, if he is sure he is making that pledge good to that oppressed people? No, sir. The declarations of too many of those who avow themselves in favor of the passage of the bill show what

> universal distrust there is in regard to this legislation; and yet we are urged to put it right through without let or hindrance * * * That government which cannot protect the rights of its citizens is a mockery. If the State fails to do this, then the United States must enable her to do it, if the failure results from want of power, or compel her, if it is a voluntary failure * * * Under this constitutional trust the obligation rests upon Congress to make sure that such a government is established in Virginia."

January 11, 1870, Mr. Farnsworth, of Illinois, (Congressional Globe, 2nd Ses., 42st Congress, p. 362) reported in House of Representatives a bill to admit the State with fundamental conditions attached. The fundamental condition which gives rise to this litigation is as follows:

> "THAT THE CONSTITUTION OF VIRGINIA SHALL NEVER BE AMENDED OR CHANGED SO AS TO DEPRIVE ANY CITIZEN OR CLASS OF CITIZENS OF THE UNITED STATES OF THE RIGHT TO VOTE, WHO ARE NOW ENTITLED TO VOTE BY THE CONSTITUTION HEREIN RECOGNIZED, EXCEPT AS A PUNISHMENT FOR SUCH CRIMES AS ARE NOW FELONIES AT COMMON LAW."

Subject to said condition, which she expressly accepted; under which she has acted for over thirty years; and which she is now estopped from denying or questioning, the State of Virginia was permitted to resume her relations to the United States and to exercise all her ancient sovereign rights, save as they were curtailed, surrendered and limited by her assent to the fundamental conditions aforesaid.

The act of Congress embodying that condition was passed January 26, 1870, (16 U. S. Stat. at Large, p. 62).

In the course of the debate upon the bill reported by Mr. Farnsworth, Mr. Bingham, of Ohio, moved to strike out the conditions. Mr. Farnsworth (Ibid. p. 400) stated that the constitution was adopted by a vote of 201,441 votes in its favor and but 9,136 votes against it. The proposition to strike out the condition was opposed by a number of Congressmen, among whom was Mr. Payne (see p. 402), who pointed out that there was nothing extraordinary in these conditions, and at page 406 will be found a summary as follows:

> Ohio, by the ordinance of 1787, came in under fundamental conditions against framing any constitution repugnant to ordinances of 1787, and upon a further condition against holding slaves, imposed by Virginia in her cession of her rights to the Northwest Territory; and Virginia voted for that (1st Stat. at Large, p. 174).
>
> Missouri came in, in 1821, under a "fundamental condition" that a section of her constitution should be construed in a particular way. Virginia voted for that. (3rd Stat. at Large, p. 645.)

And fundamental conditions were annexed to the admission of the State of Nebraska.

In the course of the debate Mr. Bolles, of Arkansas, in the House (Ibid. p. 61), said:

> "Considering that Virginia has technically complied with the Reconstruction Acts, there is nothing for us to do now but to admit her with the fundamental conditions attached to

> this bill * * * * * I here and now say to Virginia * * * * to beware upon what she enters, for unless she administers her laws in a more equal and exact justice than I believe she will, I will vote to place her again under the control of the military, as we have Georgia and will Tennessee. This I apprehend will become our duty within less than three years; for I am quite certain the occasion will arise for Federal intervention for the protection of our citizens there."

In the course of the debate Gen. John A. Logan interrupted Mr. Farnsworth (Ibid. p. 401) and asked how he would enforce any penalty on the State, or what the penalty would be and what the people of Virginia would forfeit if they changed the constitution in violation of the bill?

Replying to General Logan, Mr. Lawrence (Ibid. 433), said:

> "If the State of Virginia should change her constitution so as to disfranchise a majority of the men now entitled to vote in that State, she would cease to have a Republican form of government, and under the powers which Congress has to guarantee to every State a Republican form of government, we could reconstruct her by the grace of God, and the power of the constitution."

And then, proceeding to a more definite answer, he said:

> "If the State should undertake to deny to citizens the right to vote secured by this fundadamental condition, every citizen so denied would have his civil action for redress in the Court against every officer denying the right.

That would be a penalty and a mode of enforcing it."

Again at page 433 he said:

> *"The fundamental condition fixes the rights of citizens, and the Courts will furnish redress for their violation. If further legislation in aid of the remedy shall be necessary it can be had. The National Courts are, or may be, clothed with requisite power to enforce this fundamental law.* I do not say that this bill furnishes all the penalties, or the means of enforcing its fundamental conditions, as fully as it should."

Then after suggesting what he would have added, he proceeded:

> "That would be a penalty and a mode of enforcing it. But without that, if Virginia should change her constitution so as to deny to the citizens the rights secured by the 'fundamental condition' her constitution in that respect would itself be unconstitutional, or at least void, and the National Courts would so declare. The constitution of a State may itself be unconstitutional or void because in contravention of a provision of the national constitution or of an authorized act of Congress obligatory on the State.'

Replying to the motion of Mr. Morgan, of Ohio, to strike out the fundamental conditions, Mr. Lawrence further said:

> "My colleague (Mr. Morgan) insists that Virginia is and always has been a State of the Union entitled to representation in Congress; and his political friends would admit her to representation without any terms or conditions.

> without 'indemnity for the past or security for the future,' giving the late rebels, without penitence or repentance, with Lee and Wise at their head, conquered but not subdued, complete political control of her fortunes and the loyal men, black and white, delivered over to the mercies of men who recently enslaved them all and made a war of rebellion to render their bondage eternal." *

The record shows, moreover, that the constitution, ratified by the people of Virginia, July 6, 1869, was not imposed upon the state by coercion as is so often asserted now. The popular vote was 201,441 in favor and 9,136 against it (Ibid. p. 400).

A committee of the legislature of Virginia, headed by Hon. Zeph. Turner, speaker of the house of delegates, appeared before the Reconstruction Committee and pledged Virginia "to keep faith and to carry out every provision," and this pledge was in writing and in print in a document which Mr. Farnsworth, the patron of the bill admitting Virginia, presented to the House (Ibid. p. 402).

The anxiety of the Virginians to be re-admitted was referred to by Mr. Whittimore (Ibid. p. 437) who described them as "eager anticipants of power who had plied their persuasive arguments and organized endeavor to convince our ears and control our acts."

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* Apropos of this allusion to the Lees and Wises, it accepted as a compliment, because it shows who were the men that had maintained the courage of their convictions on the opposing side and that they had made their foes know them. While using personal names, the language was directed to a class, composed of men who, having done their best, after staking all and losing all, were not rushing forward to kiss the hand that smote them, or offering to give pledges which they did not understand or did not intend to keep. They were men who knew the solemnity of a pledge and what the giving of it imported.

It may also be noted that they were absent or in opposition, when it was sought to violate the plighted faith of the State as conspicuously as when they were no parties to the giving of the obnoxious pledges

And finally Mr. Farnsworth, the patron of the bill (Ibid. p. 500) said:

> "Allow me to say that the opposition to the conditions contained in this bill does not come from the people of Virginia. Neither Governor Walker, nor any of the administration, if I may be allowed the expression, elected on the ticket with Governor Walker, that I am aware of, have protested against these conditions * * * * *Neither do they object to the other conditions with reference to the change of their constitution, for they have provided in that same constitution thus ratified by so large a majority amounting almost to unanimity, nearly the same thing contained in the bill.*

The provision of the constitution of Virginia referred to by Mr. Lawrence was Article XII, Sec. 2, on the subject of amendments:

> "That no amendment or revision shall be made which shall deny or in any way impair the right of suffrage or any civil or political right as conferred by this constitution except for causes which apply to all persons and classes without distinction."

So eager were the Virginians to regain control of the State that they did not hesitate to enlist in their behalf Gen. Henry H. Wells, the defeated candidate of what was known as the radical wing of the Republican party in the State of Virginia at that time. For, be it remembered, that the successful party, headed by Gilbert C. Walker, adopted, in that campaign, the name of "True Republican party;" and it is also a matter of congressional record that Raliegh T. Daniel, the chairman of this "True Republican Party," telegraphed to President Grant immediately after the elec-

tion of July 6, 1869, "Congratulate you upon the success of *your* policy in Virginia."

Virginia, upon these solemn pledges, given in her constitution itself, and upon the conditions solemnly annexed to the act readmitting her, and upon this hungry chorus of asseverations of her good faith, resumed her relations to the Union and her Senators and Representatives took their places in the Congress of the United States.

Concerning the origin and derivation of the right of suffrage in Virginia, see:

91 Virginia 322, Pierson vs. Supervisors.

Wiley vs. Sinkler, 179 U. S. 58.

The right to vote for members of Congress is not derived merely from the Constitution of the State, but from the Constitution of the U. S.

Swafford vs. Templeton, (May 19, 1902,) 185 U. S. p. 487.

The pledge given by Lawrence that further legislation, in aid of the remedy for the invasion of civil rights would be enacted, was redeemed by Congress, for in the following year the section, which is now Section 1979 of Title XXIV, Civil Rights Bill, was enacted April 20, 1871. (See Stat. at L. Vol. 17, p. 13, Chap. 22, Sec. 1).

The act conferring jurisdiction upon the Circuit Courts to enforce the rights of citizens of the United States to vote in the several States was passed May 31, 1870 (16 St. at L. p. 140, Chap. 114), and by the same act jurisdiction was conferred upon the Circuit Courts, of all suits brought to redress the deprivation under color, of any law, statute etc., of any right, privilege or immunity by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States,

By that same act also, Section 18, the pledge of Congress to furnish ample remedy was redeemed when it declared that, in all cases arising under the Civil Rights Bill, the Circuit Courts, when the laws of the United States were deficient in provisions necessary to furnish suitable remedies, should adapt their proceedings to the common law as applied in the States, and should give substantial relief, comformable to those remedies.

It has been necessary to set forth the above legislation in the order of its enactment:

(1) To show what the rights of complainants are;

(2) That they are Federal rights;

(3) That the Federal law-makers intended to protect them;

(4) That they exacted pledges from the States to respect them;

(5) That they did not trust to the pledges of the States alone;

(6) That they intended to commit the protection of these rights to Federal courts;

(7) That they pledged themselves to create in Federal Courts a jurisdiction to entertain suits for the protection of these rights;

(8) That they redeemed that pledge by conferring express jurisdiction in these cases upon the Circuit Courts;

(9) *That they conferred the jurisdiction unlimited by precedents of practice, and purposely enlarged it so as to enable the Circuit Court to adapt their procedures to State procedure lest they might find some technical difficulty in the way of their enforcement of these rights; and*

(10) Because the decision of the court below, as is respectfully urged, "sticks in the bark" of *nisi prius*

precedents in cases not arising under the Civil Rights Bill; ignores the enlarged jurisdiction, which the courts are solemnly called on to exercise, and thwarts the purpose of Congress, by disclaiming, evading and ignoring a jurisdiction, which the Federal Circuit courts were directed to exercise.

The Circuit Court had jurisdiction of both cases and should have exercised it.

First. It had jurisdiction of the subject—the State was not a necessary party—and the political nature of the controversy did not defeat the jurisdiction.

Second. It had jurisdiction of a bill in equity and should have granted an injunction.

Third. It had jurisdiction to grant and apply the particular remedy of a writ of prohibition.

We will argue these propositions in the order stated

FIRST. It had general jurisdiction—the State was not a necessary party—and the political character of the controversy did not defeat the jurisdiction.

The cases presented in the court below bear no resemblance whatever to cases of the class of *Luther v. Borden*, 7 Howard, 1, and *Taylor & Marshall v. Beckam*, 178 U. S., 578.

In those cases rival State governments existed, and the Federal Courts were called upon to decide between the claims of two existing State governments.

In the first case, the political powers of the Federal government had recognized one of the existing governments of Rhode Island, and the Supreme Court held that, it being a political question, Federal Courts would follow the decision of a co-ordinate branch of the Federal government upon the political aspects of the case.

In the case of Taylor & Marshall v. Beckham, which is about the last case of this character decided,

the Supreme Court in substance held that upon a like question arising in the courts of the State it would be guided by the decision of the court of last resort of the State, on matters pertaining altogether to the construction of the state laws, involving the question which of two existing governments in the state, was lawful.

These rulings are the substance of the long series of cases involving the same question, decided between 1848 and the present time by the Supreme Court.

But the cases at bar present no such issues as these.

There is but *one* government in Virginia.

There is no rival government.

The sole and only question is whether the only set of officers in the State—officers confessedly lawfully elected and qualified—*are acting under the law or outside of the law.* Whether lawfuly elected officers of the State are proceeding under invalid and unconstitutional laws. Whether they are not, in fact, violating the constitution and statutes of their own State and the United States which they are sworn to support, and under color of invalid and unconstitutional constitutions, schedules and ordinances, depriving plaintiffs of rights, privileges and immunities guaranteed to them by the constitution and laws of the United States, and State of Virginia.

The State has instituted no inquiry on this question, and is party to no proceedings whereby her presence in these causes is necessary.

They are not suits brought to review anything to which she has ever been a party. They relate to no cause pending in any of her tribunals, to which she is either directly or constructively a party. They do not seek to compel her to do anything. In order to do justice it is not necessary to enter any affirmative order against the State.

The state is not a *dual entity;* she exists by virtue of one Constitution and one set of laws enacted pursuant thereto.

If the federal courts have not power, in enforcing an admitted right of suitors, against officers violating that right, to determine what is the constitution and what are the lawfully enacted stateutes of the State; and if they have not, having so decided, power to compel State officers to conform to the valid and subsisting laws, State and Federal; then the power ostensibly conferred upon the federal courts is worse than nothing, it is folly.

If this is the whole scope of federal judicial power the federal judiciary can in no case restrain officers of a State from setting at naught the constitution and laws of the State or the United States; for the defense made in this case would be good in every case, to-wit, that the officers whom it is sought to restrain are acting under color of a State constitution and State laws; that in doing so, they represent the State; that the State is thereby a necessary party to the enquiry, wherefore the federal courts have no jurisdiction of the subject.

This is certainly a new and restricted view of the power of the federal judiciary.

It involves this inevitable result.

Officers of a State may pervert and misconstrue the laws of a State, and administer laws, invalid *per se* and violative of the federal constitution and laws and federal rights of citizens.

Federal statutes may grant redress in federal courts to citizens thus affected.

Citizens, by virtue of those statutes, may sue in Federal Courts to restrain such state officers from plain violations of law.

But such officers may appear, suggest that they are

violating the law in their official character as representatives of the State; and thereupon the federal court must stop; must hold that a judgment against them for the perversion of laws, State and Federal, is in effect a judgment against the State administering her laws; and that as the State is not a party and cannot be made a party, federal judicial authority is powerless although it may plainly see that the law is not a valid law of the State, or is one which if it be a law of the State, is not such as the State had a right to pass.

If this be indeed the limit of federal judicial power, then this court has been very late in finding it out. Under this Constitution even courts of the State of Virginia have greater power to enforce federal laws than have the federal tribunals themselves.

There can be no doubt of the jurisdiction of Circuit Courts to entertain this class of cases.

As late as the year 1900 the Circuit Court said: "The right to vote for members of Congress is not derived merely from the constitution and laws of the State in which they are chosen, but has its foundation in the constitution and laws of the United States."

Wiley v. Sinkler, 179 U. S. 58.

In 1901 this Court again said:

"A case arises under the constitution of the United States, when the right of either party depends upon the validity of an act of Congress."

Patton v. Brady & Co., 184 U. S., 608.

And in a case decided in the present year the jurisdiction of the court has been sustained in a case of this class.

Swafford v. Templeton, 185 U. S., p. 487.

If the contention that the state is a necessary party and that the nature of the controversy is political, be good in these cases why was it not good in the cases of

Wiley v. Sinkler and Swafford v. Templeton above cited?

The form of the action does not change the nature of the controversy.

The actions in those cases were against election offictrs of a State for refusing the plaintiff's vote.

The election officers defendant under the State law and pleaded that in their action they were merely representatives of the State.

The State was as much a necessary party to those cases as to these, and the questions were as much political questions in those cases as are the questions in these cases.

This court has sustained the jurisdiction *in equity* to restrain state officers from violating the law in many cases, independent of the special jurisdiction conferred upon federal courts in suits in equity brought under the Civil Rights Statutes.

In 1872 in the case of Kellogg v. Warmouth, 14 Fed. Cases, 7667 the Circuit Court of Louisiana entertained a bill of this character in a case singularly resembling this in its facts, and restrained the governor of Louisiana from using false registration lists.

The Supreme Court of the United States refused to interfere by a writ of prohibition to prevent the exercise of that jurisdiction.

See ex parte Warmouth, 17 Wall. 64

In Davis v. Gray, 16 Wall, 203, Governor Davis of Texas was enjoined from wrongfully issuing patents to lands.

In Board v. McComb, 92 U. S. 531, the Governor of Louisiana was restrained from issuing bonds under an unconstitutional act, and the Court, replying to the contention that the State should be a party said:

"In either case, if the officer plead the au-

> thority of an unconstitutional law for the non-performance or violation of his duty it will not prevent the issuing of the writ. An unconstitutional law will be treated by the course as null and void."

And again it said:

> "When plain official duty * * * * is to be performed * * * * and when such duty is threatened to be violated by some positive official act, any person who may sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

In Ralston v. Missouri Fund Commrs., 120 U. S., 391, the Governor of Missouri and others were enjoined from selling certain property.

In Mutual Life Ins. Co. v. Boyle, 82 Fed. Cases, 705. the court used very strong language concerning the power of the federal courts to restrain state officers, acting under color of state statutes or state authority, from doing acts instigated by malicious, wicked, arbitrary and capricious designs to oppress the plaintiffs and deprive them of their rights.

The Supreme Court of Virginia has likewise declared:

> "Chancery has jurisdiction to enjoin illegal acts of an officer attempted *colore officii*. A suit against an officer is not necessarily a suit against the State, e. g.—a suit to restrain one from doing unlawful acts under color of an executive office, such as illegal acts of the Commissioner of Agriculture."
>
> Blanton, Comr. v. So. Fert. Co. (1883) 77 Va., 335.

The defendants, in the court below (cited), in sup-

port of their contention that these proceedings were suits against Virginia contrary to the XIth amendment of the Constitution of the United States and that Virginia was a necessary party, the following cases:

Louisiana v. Jumel. 107 U.S., 711.

Hagood v. Southern, 117 U. S., 52.

Cunningham v. R. R., 109 U. S., 446.

Ex parte Ayers, 123 U. S., 443.

McCawley v. Kellogg, 2 Woods Cir. Ct., Reps., 13.

Collector v. Day, 11 Wall., 113.

Not one of these cases in any way weakens the contentions of this argument.

In the Jumel case the plaintiff sought "to compel by judicial process the officers of the State to enforce the provisions of the act" (it was a law imposing an annual tax).

The effort was to *affirmatively invoke and employ the machinery of the State to enforce a law to collect money,* and it was impossible to do this without affirmative mandates upon the State.

In the present cases, the whole object is to restrain proceedings of officers under a void law. Even in the Jumel case there was a strong dissent by Field and Harlan.

In Haygood v. Southern, 109 U.S., 53 (1885) the suit was brought *to enforce the performance of a contract made by the State* by mandates upon the officers of the State. The decision points out the distinction between cases in which the relief sought is the performance of a plain official duty, and cases like that in which *the relief sought was affirmative official action by State officers to compel them to carry out a contract of the State.*

The case of Cunningham v. R. R., 109 U. S., 446

(1883) is strongly in our favor. Mr. Justice Miller enumerated the cases in which the federal judicial power may be invoked. His second and third enumerations plainly include cases like these.

"2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. *In these cases he is not sued as, or because he is, an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer.*

To make out his defence he must show that his authority was sufficient in law to protect him." (p. 452.)

"3. A third class * * * * is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process * * * *. It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the defendants, a Court of Chancery may, by a mandatory decree, or by injunction * * * * enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's rights."

The opinion approves the cases we have cited and it is respectfully insisted that these cases fall within the second and third enumerations made by Justice Miller.

They are cases in which officers assert authority and must make out their defense, by showing that their authority was sufficient in law to justify their action and protect them. They are cases in which officers of the government have a well defined duty, in regard to

a specific matter, in which voters having a distinct interest capable of enforcement by judicial process are injuriously affected by their perversion of their duties, and the application is to enforce the rights of voters by an injunction forbidding the officers from acting under void laws.

The distinction is clearly drawn by Mr. Justice Miller in the Cunningham case, between suits of that character seeking affirmative relief, and those in which the relief sought is the forbidding of State officers from acting unlawfully.

In the case of *In re* Ayers, 123 U. S., 443, it is expressly said:

> *"But it is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespass and wrongs, nor to prohibit suits* against officers in their official capacity and either to resist or direct their official action by injunction or mandamus."

And the Court cited approvingly the case of the Board of Liquidation v. McComb, 92 U. S., 531, and referred to Seibert v. Lewis, 122 U. S., 284, as an instance in which such relief would be granted.

The same authorities are cited approvingly in the case of Minnesota v. Hitchcock, 185 U. S., 388.

The case of McCawley v. Kellogg, 2 woods Cir. Ct. Reps. 13, was a plain attempt to obtain affirmative relief against the State upon a contract of the State, by compelling officers to do what the State had neglected to do, and is in no respect parallel with these cases.

The case of Collector v. Day, 11 Wall. 113, must have been cited by mistake, for it has nothing to do with this subject.

The authorities cited by the defendants in the Court below on the proposition that the bill seeks to have the Court interfere with the respondents in the performance of purely governmental functions and political duties are equally at fault.

The opinions of Fuller, C. J. and Hughes, J., in the case of Green v. Mills, 69 Fed. Rep., 852, do not support the defendant's contention. They carefully note the fact that the bill in that case did not charge or point out as deducible from the facts stated any discrimination on account of race, color or previous condition of servitude. This is the language:

> "No discrimination on account of race, color or previous condition of servitude is charged or pointed out as deducible on the face of the acts in question."

This was plainly the chief support of the decision. The decision also dwelt upon the fact that the suit was not for the infringement of any civil rights. These suits do charge discrimination against the plaintiffs and petitioners on account of race, color or previous condition of servitude. They do aver the invasion of the civil rights of plaintiffs and petitioners as the ground for invoking equitable interposition; *and they point to the statute applicable to this very class of cases, giving them the right to seek redress by bill in equity or other appropriate remedy as the basis of their claim of jurisdiction.*

The cases of Mississippi v. Johnson, 4 Wall., 475; Georgia v. Stanton, 6 Wall., 50, and Luther v. Borden, 7 How., 1, and indeed all the other cases cited by defendants below fall within the principle above discussed concerning the going counter by one department of the government to rulings of another department of the same government on political questions; and the

State cases cited by defendants below, from West Virginia, Illinois, Maryland, Minnesota and North Carolina merely announce the principle that under the old State chancery practice, independent of statutes creating jurisdiction, there was no power of chancery to interfer for the protection of rights of this character.

Much was said in the argument below by the learned Chief Justice about the invasion of the legislative and executive department by the judiciary, and the argument seemed to have weight in the mind of the learned Chief Justices; but it is respectfully submitted that in the cases at bar the point should have no weight whatever.

The judiciary of the United States is not in any sense a co-ordinate department of government with the legislative, executive or judicial departments of any of the States.

It is a co-ordinate department of the Federal Government. In cases in which it may be called upon to restrain or control the conduct of either the Legislative or Executive Department of its own Government upon the construction or administration of the laws, the argument might be pertinent that it was invading the sphere of one of its own co-ordinate departments.

But Federal power is not vested for administration, in any department of State Government as a co-ordinate of the Federal Government. On the contrary, the administration and the enforcement of Federal laws is committed solely to the several departments of the Federal Government, with both the power and the duty to enforce those laws against everybody, including every department of the State governments. To this extent, at least, the State governments, in every

one of their departments, are subordinate to every department of the Federal Government.

There are undoubtedly many cases in which the judiciary department of a State government might properly hesitate to attempt to control or direct one of its co-ordinate departments in the State government, because of the distinct spheres of the several co-ordinates in the system of the State and their relations to each other as parts of a homogeneous whole.

But this reasoning is not applicable to a Federal Court. It is no part of the State government. Whatever it may do touching any department of a State government, it does not invade a co-ordinate sphere. It moves in a different and independent sphere from those of the State governments. Its duties are imposed by its own distinct government; and, in enforcing those duties, it matters not what department of the State government it operates upon, it is as much bound to restrain the executive or legislative department of a State government as any other department or instrumentality of the State government. It possesses no more power to invade the judiciary department of a State government than to invade any other department thereof. If Federal rights are entrusted to it for protection it has as much power to invade one department as another of a State government in the enforcement of Federal law.

This distinction has been thoroughly recognized by the State Court themselves.

In the case of Bates v. Taylor, 3 Pickle (Tenn.), 319, decided in 1899, in which the State Court refused to grant the writ against the executive department of the State government, the Court refused to be guided in its action by sundry Federal decisions cited by counsel in which governors of the State had been re-

strained. It declined to be guided by the Federal decisions for the following reason:

> "The most that can be said of these cases is that they show the jurisdiction of the Federal Courts to restrain the governor of a State from doing a wrongful act to the injury of individual rights * * * * *There is a wide difference between the relation of the Federal Judiciary and the State Judiciary to the governor of the State.*" *(Italic ours.)*

And then the opinion proceeds to point out the difference above contended for, which is too plain to need further elaboration.

In the light of the above authorities and of the plain purpose of Congress to place civil rights under the protection of the Federal Courts; in the light of the special jurisdiction conferred, by the acts above quoted, upon the Circuit Court; in the light of the broad grant of remedy by action at law, *suit in equity,* or *other appropriate remedy,* given to the people who might be wronged; it is respectfully submitted that the Circuit Court had jurisdiction to entertain the bill in equity, and ought to have passed upon the legality and the constitutionality of the laws and ought to have granted the relief prayed for.

This Court, in the case of Railroad Co. v. Brown, 17 Wallace, 445, did not hesitate to enforce the acts of Congress touching civil rights against a petty corporation.

Speaking of the grant on conditions not to discriminate against blacks it said:

"Congress in the belief that this discrimination was "unjust, acted. It told this company in substance that "it could extend its road within the district as described, "but that this discrimination must cease and the colored

"and white race, in the use of cars, be placed on an "equality."

"*This condition it had the right to impose* and in "the temper of Congress at the time it is manifest "the grant could not have ben made without it. It "was the privilege of the company to reject it, but to "do this it must reject the whole legislation with which "it was connected. It cannot accept a part and repu- "diate the rest. Having, therefore, constructed its "road, as it was authorized to do, and in this way "greatly added to the value of its property, it will be "held to a faithful compliance with all the terms "accompanying the grant by which it was enabled to "secure this pecuniary advantage."

Was Congress in a different temper when it imposed the fundamental conditions upon Virginia?

This Court has said that it had the right to impose these conditions.

White v. Hart, 13 Wall. 646.

Did not Virginia accept the conditions as solemnly as did the railroad in Railroad v. Brown?

Can she accept a part of the act restoring her and repudiate the rest?

Having accepted it and greatly added to her political liberties as they existed then, will she or not be held to a faithful compliance with all the terms accompanying the grant by which she was enabled to secure so great an advantage?

Is it not more than a question of her redeeming her plighted faith?

Does it not involve the liberty of the people for whom Congress assumed the guardianship and to whose protection the Federal power, legislative, executive and judicial has been solemnly pledged?

To seek to avoid a jurisdiction thus conferred would

be to the unspeakable shame of that department of the Federal Government which is the glory of its citizens, and, until now, has proved itself the palladium of their libertites.

By the acts cited Congress deliberately broadened the jurisdiction of the Federal Courts in order to enable them to reach the evil it intended to eradicate. We must not construe the power of Courts, or their modes of procedure ignoring these acts which were intended to make the jurisdiction broader and deeper and wider make the jurisdiction broader and deeper and wider than it had theretofore been.

As was said by Judge Bradley in Pennsylvania Co. v. St. St. Louis, etc., R. R. 118 U. S.:

> "We must not shut our eyes to the fact that new circumstances and conditions of themselves require and produce a modification of old rules, or the application of new ones."

All that is said in the case of *In re* Sawyer, 124 U. S., 200, cited by defendants, is (p. 210): "The office and jurisdiction of a Court of Equity, *unless enlarged by express statute,* are limited to the protection of property."

Our point is that the protection of Civil Rights was committed to a Court of Equity by the express language of the statute.

The Supreme Court of Virginia, in the case of Wise v. Bigger, Clerk, et al, (1184) 79 Va., 269, held that it had jurisdiction to declare what acts of the general assembly were and what were not law, and upon the petition of a citizen it had the right to compel the keeper of the rolls to strike from the legislative rolls and the superintendent of public printing to omit from the acts of assembly, an act which in the judgment of that Court was not law.

Yet the Attorney General of Virginia, in the Court

below, denied the power of a Federal Court to consider whether acts, under color of which State officers were proceeding, were spurious or genuine, constitutional or unconstitutional, although they might sweep away from a hundred thousand citizens of the State, Federal rights guaranteed to them by Federal law with the duty of protecting them committed to the Court to which the appeal was made.

Again quoting the language of Judge Bradley, we say:

> "Is this law? Is it American law? I cannot believe it."

SECOND. The Court had jurisdiction of the bill in equity and should have granted the injunction.

The cases cited above, in discussing the jurisdiction generally, show how the jurisdiction in equity has been invoked and exercised in cases similar to this.

There was no other adequate relief.

The suit was brought by individuals, but for the relief of a class, and is of a character often sustained both in Federal and State Courts.

Blanton v. So. Fert Co., 77 Va., 335.

The action at law provided by the statute for the redress of individual grievances does not give adequate and complete relief.

That action, however large the recovery in it may be, leaves the law in force; and leaves the plaintiffs disfranchised and deprived of the right of suffrage so long as the officers are allowed to treat the obnoxious law as valid, and run the risk of other personal actions.

It is an intolerable outrage upon a free citizen entitled to vote that he is deprived year after year of his right of suffrage with no recourse but to sue for monetary damages.

Moreover, no matter how outrageous the law may be, it is certainly doubtful, as juries in Federal Courts are summoned and constituted under existing laws, and liable as they are to have upon them partizan opponents who would never consent to give damages for a political wrong, whether it will ever be possible to recover damages in a personal suit; and even if judgment for damages be recovered, it by no means follows that the effect will be to force the repeal of the obnoxious laws. The men who passed these laws are in possession of the State legislature; they can and will appropriate money out of the public treasury to defend the suits brought by individuals to obtain redress for the enforcement of these laws. It is doubtful how many of the perpetrators of these offences are responsible pecuniarily—It is also certain that every obstacle which can be interposed by the individual defendants and State authorities, to make the personal actions futile, will be placed in the way of recoveries.

It is proper that a Court of equity should interpose to prevent these vexatious and outrageous wrongs, and a multiplicity of suits.

If, therefore, the case be not one in which the State is a necessary party, or of such political character that the Courts have no cognizance of it, the equity jurisdiction is the reasonable and proper jurisdiction to invoke.

If it cannot be invoked, and a great throng of citizens of the United States, injuriously affected by the enforcement of this law, cannot bring a class suit for redress, and have no relief but individual actions at law for redress, then the boast of our profession that there is no wrong without its remedy, and the Federal promise of relief, are mockeries, farces, and delusions.

The Supreme Court of the United States in the case of Yick Wo v. Hopkins, 118 U. S. 356, found no difficulty whatever in sustaining the jurisdiction to protect the citizens of the Chinese Empire. It was called upon to construe an ordinance, enacted under the authority of a State, conferring arbitrary power to give or withhold certain rights, without regard to the competency of the applicants or the propriety of their places, and without regard to discrimination in the legal sense of the term. It held those ordinances void and repugnant to the XIVth Amendment. It listened not, for a moment, to the plea made by the officers administering these vicious laws that they were the representatives of the State, or that the controversy was of a political nature. It recognized its duty to uphold the law entrusted to it for the protection of citizens of the United States and all others under her protection. It exercised the undoubted jurisdiction it possessed, and it went further and declared that though the law itself be fair on its face and impartial in appearance, yet, if it were applied and administered by public authority with an evil eye and an unequal hand,so as to make unjust discriminations against citizens of the United States—discriminations as intolerable, as slavery itself—there was no doubt of the power of the Federal Courts to interpose Federal authority to enjoin the attempted enforcement of the obnoxious law.

This Court as late as 1898, in the case of Williams v. Mississippi, 170 U. S. 213, while declining to exercise jurisdiction in that case, because it had no facts before it, cited approvingly the decision in the Yick Wo case. While it refused, in the Williams case, to argue from the probable to the actual, it intimated clearly that if the facts had been apparent, as in the

Yick Wo case, it would have entertained no doubt of the jurisdiction.

The facts in this case appear in the pleadings and, by the manner of the decision, must be assumed to exist as if the case had been decided upon a demurrer to the bill. If those facts do not constitute grounds for Federal interposition and relief, then there is no case in which wronged citizens of the United States can obtain redress in Federal Courts, if the State statutes under which they are wronged, have even the color of adoption and enforcement by the States which oppress them.

THIRD. The Circuit Court had jurisdiction to invoke and apply the particular remedy of a writ of prohibition.

The Circuit Court had the jurisdiction in prohibition, not only by virtue of Section 1979, which authorized the injured party to seek relief by "other proper proceedings for redress," but by the express terms of Section 722, which authorized the Circuit Court in cases arising under the Civil Rights law, to utilize the remedies prevailing in the State Courts, notwithstanding those remedies might not have been available theretofore in the Federal Court, or might not be available there still, in cases of another class.

It seems to us there can be no doubt about this, reading Section 722, of the Revised Statutes.

Something was suggested by the Honorable Chief Justice, during the argument below, to the effect that it had been contended that the jurisdiction act of August 13, 1888, (Supp. to Revised Statutes, Vol. 1, p. 611) modified or repealed the 12th and 16th paragraphs of Section 629, conferring jurisdiction on the Circuit Court, or Section 722, enlarging and adapting the procedure of Circuit Courts in Civil Rights cases.

Surely there can be nothing in this suggestion. On the contrary, the act itself (Sec. 5, p. 614) expressly preserves Section 722, and the remedies accorded under the Civil Rights Act.

We hold that under the above acts the Circuit Court had jurisdiction in prohibition in these Civil Rights cases, to the full extent, and by the same methods of procedure, as the State Courts of Virginia and West Virginia.

So holding, we insist that, if we show that the writ of prohibition is the proper writ to afford the relief asked; that the writs of prohibition and mandamus have been for many years, constantly employed in the State of Virginia and West Virginia, to redress grievances of this identical character; and that they are still in constant employment by those State Courts; it was the duty of the Circuit Court to recognize that fact and grant the relief prayed for, in the form in which it was asked.

We insist, moreover, that the authorities cited by the other side, tending to show the restricted use, heretofore, by Courts of the United States, of the writ of prohibition in cases of a class altogether different from Civil Rights cases, have no bearing whatever upon our contention and should not be considered as defeating our right, in face of the plain authority, and duty to use this writ, enjoined by Section 722.

Section 722 expressly provides that the jurisdiction conferred upon the Circuit Court by the provisions of the title "Civil Rights," for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; and then the section adds that where

the laws are not adapted to the object *"or are deficient in the provisions necessary to furnish suitable remedies, the common law, as modified and changed by the constitution and statutes of the State, wherein the Court having jurisdiction of such civil cause is held * * * * shall be extended to and govern the said Courts on the trial and disposition of the cause."*

Now it is frankly admitted that the use of the writ of prohibition, in the Federal Courts prior to this act had been narrow and circumscribed; and if the power of the Circuit Court to employ the writ rested solely upon the *nisi prius* decisions rendered in litigations of a different character and before this enlargement of the jurisdiction, there would be small ground to contend that the use of the writ in these proceedings was justified by precedent.

But every case cited by counsel for the defendants in the Court below, showing that the use of the writ of prohibition in Federal Courts is limited and curtailed, arose upon the old State of the law.

We are now however to consider whether the availability of the writ in a "Civil Rights" case is not expressly granted, and whether jurisdiction and authority to use it is not distinctly created and extended, to the Circuit Court, by Section 722.

The nature of the writ of prohibition is thus described in the following leading authorities:

> "It was originally understood to be a writ issuing out of some Superior Court directed to the Judge and parties of an Inferior Court. But in practice it has gone beyond this limit, not only to restrain inferior judicial tribunals, but their collateral proceedings. Nor has it been confined entirely to inferior judicial tribunals as seemed first to be intended; on the

contrary, it has been extended to other public functionaries, officials, and persons, charged with the performance of a duty not wholly judicial and not even very expressly or strongly marked with a judicial character.

The writ of prohibition lies from a Superior Court, not only to inferior judicial tribunals, but to inferior ministerial tribunals possessing incidental judicial powers and known as quasi-judicial tribunals, and also in extreme cases to purely ministerial bodies when they usurp and attempt to exercise judicial functions."

Am. & Eng. Ency. of Law, Vol. 19, old Ed. 275.

The same authority, speaking of commissioners assembled in special session to ascertain the result of an election, says:

"Aside from the quasi-judicial functions necessarily incident to their duties in determining that the ballots, poll books and certificates of the election returns laid before them are genuine that *they are in fact the returns* and substantially in the form prescribed by the statute and to correct or have them put in form if they are not so."

The cases cited in connection with the above authority are:

Connecticut River Ry. Co. v. County Comrs., 127 Mass. 50; 3 Hill, South Carolina, 314.

And the following English cases are also cited:

Toomer v. London &c. R. R., L. Rep. 2nd Ex-Div. 451.

The Great Western R. R. Co. v. Ry. Comrs., L. R., 7 Q. B. D. 182.

Great Western R. R. Co. v. Wetherford &c. Ry. Co., L. Rep., 17 Chans. Div. 493.

In Spelling on Injunctions and Other Extraordinary remedies (Ed. 1901, Vol. 2, Sec. 1744), it is said:

"Commissions and other bodies are often vested with judicial powers in the performance of their duties in carrying out the office of their creation; and where such quasi-judicial bodies exceed their judicial powers, *or attempt to usurp unauthorized judicial powers*, prohibition will lie against them * * * *

"On a similar principle such writ will lie from the Judge to the County Commissioners assembled in special session to ascertain the result of an election to prevent them from transcending their powers."

The same authority says:: (Sec. 1720).

"It is no defense to the writ that the act sought to be prohibited is ministerial merely, if the party prohibited is part of the machinery of the obnoxious law and the instrument in the attempt to make its prohibitions effectual when it is void."

And Bailey on Jurisdiction (Ed. 1899, Sec. 446), says:

"The writ lies where, although the body prohibited may have jurisdiction of the subject, some question arises which is not within the power of the body to decide."

The same authority (Sec. 452) declares that it is employed to restrain election commissioners from transcending their powers.

High on Extraordinary Legal Remedies (3rd Ed. 1896, 715) describes the writ of prohibition as follows:

> "It is a proceeding wholly collateral to the proceeding assailed, intended to arrest that proceeding and prevent its further prosecution by a Court, *or a board,* or a person having no jurisdiction of the subject matter in dispute.
>
> It is the means by which a superior exercises its lawful jurisdiction to restrain an inferior and keep it within the bounds of its jurisdiction.
>
> It is a civil proceeding to prevent the further exercise of an unwarranted jurisdiction."

And again it is said at Section 778a, that it is granted against Boards of County Commissioners to prohibit them proceeding *under a law which is unconstitutional.*

The same authority declares:

> "The appropriate function of the remedy is to restrain the exercise of unauthorized judicial or quasi-judicial power, which is regarded as a contempt of the State or Sovereign, and which may result in injury to the State or to its citizens."

Three conditions are necessary to warrant the granting of the relief:

1. That the Court officer or person against whom it is sought is about to exercise judicial or quasi-judicial power.

2. That the exercise of such power is unauthorized by law.

3. That it will result in injury for which no other adequate remedy exists.

And the remedy may be invoked against any body of persons or officers assuming to exercise judicial or quasi-judicial powers, although not strictly or technically a Court.

Spelling on Injunctions and other Extraordinary Remedies (Sec. 1718) also says:

> *"The writ is sometimes termed the counterpart of mandamus. It is the counterpart in the manner in which it operates being negative, while mandamus is positive in its command."*

High on Extraordinary Legal Remedies (Sec. 733 and Sec. 779) says:

> "It is a prerogative writ usually issued in England in the name of the King; in this country in the name of the State.
>
> The governing principle in such cases is that when an inferior tribunal proceeds in excess of its lawful jurisdiction, it is chargeable with a contempt of the sovereign as well as a grievance to the party injured. It may be issued at the instance of a stranger."

And Section 781 says:

> "The province of the writ is not necessarily confined to cases where the inferior is absolutely devoid of jurisdiction; *it extends to cases where the inferior, although rightly entertaining jurisdiction of the subject matter in controversy, exceeds its legitimate powers.*"

While it is not insisted that the writs of prohibition and mandamus are in any way identical, it is respectfully urged that in a case where the sole object of the proceeding is to restrain a defendant, such as a body of election commissioners, from proceeding under an invalid law or otherwise exceeding their lawful authority, the writs of prohibition and mandamus are only distinguishable from each other in this; that if all to be accomplished is to forbid their doing certain things the writ of prohibition is sufficient; while if the command is to be more than a prohibition and

is to go further and order them to do something positive, mandamus is the proper remedy. In this sense the two writs are counterparts of each other and, as we shall show, they have been employed by the State Courts of Virginia and West Virginia as substantially identical to accomplish the same thing in cases like the present.

As to the nature and office of the writ of prohibition, as employed in modern practice, see:

Sweet v. Hulbert, 51 Barb. 312.

And for a very thorough review of cases, in which mandamus or prohibition will lie against executive officers, even in the Courts of their own State, see the dissenting opinion of O'Brien, J., (1898) in People etc., v. Morton, 156 N. Y. 149.

Cases in which these writs of prohibition and mandamus have been unhesitatingly issued by the State Courts of Virginia and West Virginia, are cited by all the text writers in support of the above views, and it now remains to call attention to the particular circumstances under which these remedies have been invoked and employed in those States.

The two leading cases in the State of West Virginia are the case of Brazie v. Fayette, County Comrs., 25 West Va. 213; and Brown v. Board of Election Canvassers of West Virginia, 32 South Eastern, 168.

In the case of Brazie v. The Commissioners, decided in 1884, Judge Snyder, speaking of the claim that the commissioners were mere ministerial bodies, said:

> "When they say they are a ministerial body, they admit they have no right to do what it is sought to prohibit. And when they are in fact acting judicially, they seek to avoid control by prohibition by merely asserting what is denied by their acts, that they have no judicial power

and are not acting as such. The law regards the fact and not the claim of contestants * * * * It cannot be questioned that a judicial body may be restrained by prohibition from exceeding the powers conferred upon it, or from manufacturing a jurisdiction which does not belong to it. Can it be contended that the law is so defective or absurd that it cannot by the same means restrain any other tribunal, whatever may be its legitimate powers, from wholly usurping or manufacturing a jurisdiction and acting thereunder without a pretense of right, merely because it has no rightful judicial powers? I am satisfied that the law tolerates no such absurdity. In my judgment, therefore, prohibition does lie to restrain the defendants here from acting in a judicial capacity beyond or in excess of the authority conferred upon them."

And the Supreme Court of Appeals of Virginia, in the case of Hogan v. Guigon, 29 Gratton, 707, declared that the writ of prohibition did lie to prevent an excess of jurisdiction, although in that particular case it refused the writ against an error in the exercise of jurisdiction.

Suppose the Board of State Canvassers in these cases had played a game of "Seven-up" or thrown dice to decide whose names they would certify as parties elected to Congress. Does anybody entertain any doubt that the Supreme Court of Appeals of Virginia would have possessed jurisdiction to issue a writ of prohibition against the Board, commanding it to stop playing "Seven-up" or throwing dice? It had no power to play "Seven-up" or throw dice to determine who should receive its certificate.

There can be no doubt of the power of a Court to do this. Its authority to forbid such a board from doing unlawful acts has been repeatedly asserted. The only reason why the Court has resorted to the writ of mandamus more frequently than to the writ of prohibition has been that in most of the cases as is shown by the facts stated, the prohibitory order was not sufficient. Complete justice required some positive action by the party against whom the writ was directed. But if such positive action had not been required, the writ of prohibition would have been all-sufficient. And in the present case the writ of prohibition was all that could be prayed for or granted, for there was nothing remaining to be done by the Board of State Canvassers. The only returns from which they could compute and certify results, were spurious returns.

The gist of the complaint was that the laws of the State had been disregarded; that the returns which the Board was about to compute and certify were nullities; that there were no valid returns for them to compute. Therefore the only writ which could be granted against them was a writ of prohibition.

If there had been any lawful returns before them the prayer would have been for a writ of prohibition prohibiting them from counting any unlawful returns, and a mandamus requiring them to compute and certify lawful returns.

The Courts of Virginia have used the writ of mandamus and prohibition with a free hand.

In the case of Wise v. Bigger, Clerk et al, (1884) 79 Va. 269, the Supreme Court of Virginia held that it had jurisdiction to declare what acts of the general assembly were and what were not laws and to award, upon the petition of a citizen, a mandamus to compel

the keeper of the rolls to strike from the rolls and the superintendent of the public printing to omit from the printed acts of the assembly an act which in the judgment of that Court was not law.

It will be noted that the only reason why this was a writ of mandamus, instead of a writ of prohibition, was that the Court commanded the keeper of the rolls to do the positive act of striking the invalid law from the rolls. If the act had not been upon the rolls the writ of prohibition forbidding the keeper of the rolls to enroll and the printer to print, would have answered every purpose.

In the year 1895, the Court of Appeals of Virginia, in the case of McKinney v. Peers, Clerk, 91 Va. 684, granted a mandamus against the Board of Election Commissioners of Appomattox County, to compel them to canvass the returns according to law and to abstain from considering any unlawful evidence before the Board.

In that case the writ of prohibition would have sufficed, but for the command which was necessary to do the positive act of canvassing and certifying the lawful returns. If, as in this case, all the returns had been nullities and the Court had forbidden them from canvassing them, leaving no returns before the Board to be certified, then the writ of mandamus would have been unnecessary and the writ of prohibition appropriate.

Again in the year 1897, in the case of Cromwell v. The Commonwealth, 95 Va. 254, the Court of Appeals of Virginia held that members of an electoral board might be compelled by mandamus to perform duties imposed upon them by law, and for failure to obey a peremtory mandamus might be punished for their contempt.

In the year 1899, in the case of Keller v. Stone, 96 Va. 657, the Court of Appeals decided that mandamus was the proper remedy to compel the Clerk, then the custodian of the poll books, after the election, to permit a party interested to inspect them &c.

And again in the year 1899, in the case of the Richmond Ry. & Electric Co. v. Brown, the same Court decided that it was the proper function of mandamus to enforce duties growing out of public relations or imposed by statute or in some respect involving a trust or official duty. That even a private person might apply for a mandamus to enforce a public duty, not due to the government as such, without the intervention of an officer of the government.

In the case last named, can there be any question that, if application had been made for a writ of prohibition, to prevent the defendant from violating duties growing out of public relations or imposed by statutes, the Court of Appeals would have granted a writ of prohibition.

Again in the case of Eubank v. Boughton, decided in 1900, 98 Va. 429, the Court of Appeals of Virginia decided that the writ of mandamus is the proper remedy for compelling the performance by a public officer of a duty which is either imposed upon him by law or necessarily results from the office which he holds.

If the prayer in the case had been for a writ forbidding a public officer from violating his public duty, can there be any doubt that the Court of Appeals of Virginia would have been empowered to issue the writ of prohibition?

While the writ of prohibition seems to have been the favorite writ in West Virginia and the writ of mandamus the favorite writ in Virginia, can there be any

doubt that the writs of prohibition and mandamus are the usual and ordinary methods, the "other appropriate remedy," by which the Courts of Virginia and West Virginia prohibit violations of duties or enforce the performance of duties against public officers.

Indeed, in the case of Supervisors of Bedford v. Winfield, 27 Gratton, 329, the Court of Appeals of Virginia, refused the writ of prohibition only upon the ground that the petitioner had another remedy by suit in equity.

In this case the defendants, by their answer, first deny the right to relief by suit in the equity and then deny that the writ of prohibition will lie.

In the case of U. S. v. Reese, 92 U. S., 217, it is said: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected."

Our point is that as to Civil Rights, Congress has varied the form and matter, as indicated.

It is respectfully insisted in the light of these authorities that if these plaintiffs had applied to a State Court of Virginia, instead of coming into a Federal Court to seek redress, the remedy in prohibition would have been available to them; and that, in the Federal Court, by reason of Section 722, the writ of prohibition for the redress of their grievances, was equally available to them and should have been granted.

Touching the argument of the defendants that mandamus or prohibition did not lie under the old federal practice we cite, in support of our contention, that the old practice is modified by the statutes, the following

language of Mr. Justice Harlan in Louisiana v. Jumel, 107 U. S., 763.

> "In all the cases prior to Bath Co. v. Amy, 13 Wall., 244, the want of power in the Circuit Court to issue the writ, in the first instance, and in advance of a judgment establishing the rights of the parties, was put distinctly upon the ground that the whole judicial power of the United States had not been delegated to the Circuit Courts."

And the opinion goes on to point out how, by the subsequent statutes, the judicial power of the United States has been extended to the issuing of the writs by the Circuit Court.

Touching these enlarged statutory powers of Circuit Courts, Mr. Justice Harlan incidentally remarked in the Jumel case that if the case had been removed from the State Court to the Federal Court, the Federal Court might have invoked and employed the writ as incidental to the jurisdiction of the Court from which the case was removed.

In the present cases the power to employ the writs used in the State Courts although the suit is brought in the Federal Court is expressly conferred upon the Circuit Courts by the language of Section 722.

ON THE MERITS.

The Court should have entertained jurisdiction of these cases and should have proceeded to consider them upon the merits to determine whether it would or would not grant an injunction in the one case and a writ of prohibition in the other.

The answers filed traverse no allegation in the bill or petition; and the Court below, in passing on the rules to show cause, refused to admit supporting affidavits and announced from the bench that it had considered the bill and the petition as if the defendants had demurred.

So treating the bill and the petition, the following state of facts was before the Court in each case.

How Virginia has Kept Faith.

1. THE CONVENTION WAS NEVER LAWFULLY ORGANIZED.

The members of the convention declined to take the oath required by Article III, Section 5, of the Constitution of Virginia, under which they assembled. That section is as follows:

"Sec. 5. All persons before entering upon the discharge of any function, as officers of this State, *must* take and subscribe the following oath or affirmation:

I do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of Virginia; that I recognize and accept the civil and political equality of all men before

the law, and that I will faithfully perform the duty of to the best of my ability: so help me God."

The official journal of the Constitutional Convention, which was before the Court on the argument below, shows that upon the day the convention convened, to-wit, June 17th, 1901, one member only, Mr. Summers of Washington, filed his oath of office with the clerk. Mr. Thom, a member from Norfolk, moved that the members should proceed to take the oath required by law. The motion of Mr. Thom remained undisposed of until June 26th, 1901. In the meantime, on the date last named, another member Mr. Wysor, submitted the following resolution:

"Resolved: That members of constitutional conventions are officers and that a provision to this effect may be embodied in the new constitution in unmistakable terms, and that they be required to take the oath of office prescribed by the new constitution."

The proposition requiring the members of the convention to take the oath of office was taken from the table June 26th, 1901, on the motion of Mr. Ayers; and the question was fully debated, upon a motion made by Mr. Harrison for the purpose of securing a direct vote upon the proposition to indefinitely postpone the resolution.

The resolution of Mr. Thom was as follows:

"Resolved: That the convention, without undertaking to decide whether members of this body are officers or not, deem it prudent that the oath required by Section 5 of Article III of the present constitution be taken and subscribed to by the delegates to this convention."

The resolution was supported by an argument of singular ability. (See the official report of the de-

bates in the Virginia Constitutional Convention, published by authority of the Convention in the Richmond Despatch, issue of June 27th, 1901).

Its mover planted himself upon the following propositions:

First: That the convention had its origin in the present constitution of Virginia; was provided for by its terms; was acting under its authority, and was a lawful and constitutional, and not a revolutionary body.

Second: That its members, in the highest sense, were officers of the State.

Third: That the oath prescribed by Section 5 of Article III of the Constitution, under which the convention assembled, was a condition precedent to the exercise of their functions by the delegates to the convention.

The resolution was indefinitely postponed after a debate which fully disclosed the animus of the members of the convention.

The reason given by opposing speakers, in the debate, why they would not take the oath of office, was that they did not consider themselves officers and were unwilling to bind themselves by an oath, which might, even inferentially, bind them to respect the proviso of Article 12 of the then Constitution, which reads as follows:

"That no amendment or revision shall be made which shall deny or in any way impair the right of suffrage, or any civil or political right as conferred by this Constitution, except for causes which apply to all persons and classes without distinction."

The debate, which is a public record and may lawfully be referred to in support of the argument, shows a curious effort to evade the law, and Mr. Thom,

while demonstrating the necessity of taking the oath, in order to make the convention a legal body, gave away the strength of his case by the concession that the convention although assembled under the old constitution, to amend it and revise it, might treat as null and void its limitations upon the power of the convention to alter the suffrage.

His opponents defeated his motion, by plausibly turning that concession upon him and by arguing that if they took the oath to support the constitution, they would be bound by the proviso of the XIIth article to make no amendment or revision of the right of suffrage, or of any civil or political right conferred by the constitution.

In such a body it was easy to defeat three sound propositions by demonstrating one unsound contention of a speaker.

The convention by a decided majority indefinitely postponed the question and its members never took any oath.

The keynote of the discussion was one sentence uttered by Mr. Cameron in the debate, to-wit: That the requirement of the oath, taken in connection with the XIIth Article of the old constitution, would tie the hands of the convention concerning any amendment or revision which it might make, denying or in any way impairing the right of suffrage, or any civil or political right as conferred by the constitution under which they assembled.

There an be no doubt that this was the feeling of the convention which led to the defeat of the proposition to take the oath.

By refusing to take that oath the convention rendered its whole proceedings null and void and of no effect.

In support of this proposition we shall use much of the language and cite many of the authorities used before the convention itself.

The convention was not a revolutionary body, which was a law unto itself, but a constitutional convention, based upon existing constitutional provisions prescribing and defining the limitations under which it might be assembled. It was the child of law and order; the fruit of political health; the outgrowth and development of a pre-existing government. It was not a revolutionary body, the outcome of violence and anarchy, or political disease; or a dispossessing intruder assembled for the purpose of overthrowing an existing and anatagonistic power.

It was a convention co-existing with the form of government then in force and which was to continue by virtue of the old constitution and laws, until the new constitution should be adopted, as contradistinguished from a revolutionary body which contemplated the overthrow of the existing government or rebuilding it *de novo* after it had been pulled down and destroyed.

Much more to the same effect was said, all of which was summed up in the sentence used by the advocate of the resolution: "I am unwilling to accept the delegation which has been given me by my people to come to an orderly and a constitutional body, and then to throw off the limitations which they have put upon me and to become a revolutionist."

Speaking of what the people had done, it could not be better expressed than in the following language by the same speaker.

"They have chosen, in sending us as delegates to this convention, to pursue the orderly and the legal

method. They have determined to amend and revise their constitution constitutionally.

They have started with the Legislature of Virginia, where the constitution tells them they must start.

They have had submitted to them the question, under the terms and under the authority of the constitution, whether there shall be a convention to revise and amend the constitution.

They have voted upon it and have answered in the affirmative.

Then the members of the legislature again, and in obedience to the provisions of the constitution, provided by law for the election of delegates to such a convention.

In every step they have followed the law and every part of the commission we hold, we hold under constitutional warrant and by direct vote of the people.

When we assembled here, we assembled clothed with all the majesty of a constitutional body, with all the right that the people can give under a constitutional warrant and with all the power to act for them in a legal, constitutional way, in the matter of amending and revising their constitution."

Surely no argument could supplement this perfect demonstration of the manner in which that convention was assembled, pursuant to law, and under the methods prescribed by the pre-existing constitution. That the members of that convention, so assembled, were officers of the State and bound to take the oath of office prescribed by Article III and Section 5 of the old constitution, is equally demonstrable.

The first and strongest support of this contention is found in the constitution itself, under which this convention was assembled, in which, *persons elected to any convention to amend or revise the constitution are described as officers of the State.*

It will be remembered that the act of Congress, authorizing the submission of the constitution for ratification or rejection to the people of Virginia, authorized the President of the United States to submit the constitution as a whole or with certain sections to be voted upon separately.

The constitution as passed by the convention of 1867-8, Article III, Section 5, contained not only the language now embraced in it, but an additional paragraph known as the test oath and read, as originally submitted, as follows:

Sec. 5. All persons before entering upon the discharge of any functions as officers of this State must take and subscribe the following oath or affirmation.

I do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of Virginia; that I recognize and accept the civil and political equality of all men before the law, and that I will faithfully perform the duty of to the best of my ability: so help me God.

In addition to the foregoing oath of office the Governor, Lieutenant Governor, members of the General Assembly, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and *all persons elected to any convention* to frame a constitution for this State, or to amend or *revise this constitution in any manner * * * shall before they enter on the duties of their offices, take and subscribe the following oath,"* (which oath was the obnoxious test oath).

President Grant permitted the people of Virginia to vote separately upon this last quoted paragraph, when they voted for the constitution July 6, 1869; and that additional paragraph was voted down by popular vote; so that Section 5, as finally adopted by

the people required only the first oath and omitted the test oath.

But does this fact weaken this palpable evidence, contained in the section as originally proposed, that the framers regarded persons elected to a convention to amend or revise the constitution as officers of this State?

The language was that all persons, before entering upon the discharge of any functions as officers of the State, should take one oath; then, in addition to the foregoing oath certain enumerated officers were required to take the second oath of office.

The argument that "persons elected to a convention" were enumerated because they were *not* officers is certainly absurd, for the Governor, Lieutenant Governor, members of the General Assembly, Secretary of State and all the other persons enumerated, are admittedly, officers of the State. They certainly were not enumerated because they were *not* officers—they were enumerated because, being officers, the second, as well as the first, oath was required of them. This second oath was required of them because they were not only officers, but important officers; and because it was the policy of the framers—a policy reversed by General Grant—to admit persons to certain minor offices, without requiring the test oath, but to exclude from the important officers enumerated in the obnoxious section all persons not free from the "taint of rebellion," as it was then called.

What more perfect demonstration could there be that "persons elected to amend or revise this constitution" were not only regarded as officers, but as officers of the highest grade in the State; from whom a peculiarly exacting oath was to be required before they were to be entrusted with the performance of the duties of the office.

Moreover, the Constitution of 1869 provided (Art. III, Sec. 1) a constituency "entitled to vote for members of the general assembly, *and all officers elected by the people.*"

This was the only constituency existing or provided for these members of this convention.

And the Constitution of 1869, Article III, Section 2, in the language which made the members of the Constitutional Convention eligible as such, defined their position as that of officers in the following words: "All elections shall be by ballot and all persons entitled to vote shall be eligible to any office within the gift of the people."

If they were not officers elected by the people they were nothing. They neither has a status nor a constituency, for no other clauses of the constitution provided that they were elegible or who might vote for them.

The meaning of the language above referred to was construed by the Court of Appeals of Virginia in the case of Black v. Trower, et al., decided in 1884, 79 Va., 123, which declared it to include all offices, as well those filled by the Legislature as those filled by popular vote.

One would think that these intrinsic evidences contained in the Constitution, under which these men met, were sufficient of themselves to demonstrate that they were officers of the State of Virginia; but they had no such effect upon the convention.

Possibly the framers of the Constitution of 1869 did not know what they were talking about.

Possibly the Court of Appeals of Virginia was equally at fault in its decision of what constituted an office.

Let us therefore see what law writers and judges in other jurisdictions have thought of the nature of the

employment and duties of men performing these functions.

"The term 'office' in the Constitution implies an authority to exercise some portion of the sovereign power in making, executing or administering the laws."

Opinions of Justices, 3 Maine Appendix 483.

Judge Marshall said: U. S. v. Maurice 2 Brock, p. 102.

"An office is a public charge or employment." Citing: 7 Bacon's Abridgment, 279, 2 Blackstone, 36.

"An office is a public charge or employment and the term seems to comprehend every charge or employment in which the public is interested."

2 Cowen's Reports, 13. 29 Note B.

"It may be stated as universally true that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such charge or employment is an office and the person who performs it is an officer."

Shelby v. Alcorn, 36 Miss. 289.

"An office has been defined to be a right to exercise a public function or employment to take the fees and emoluments belonging to it."

42 N. Y. Superior Ct. 487. (Olmstead v. Mayor).

An officer is "one whose employment is by the public and the duties entrusted to him are official and a public charge."

Rowland v. Mayor, etc., 83 N. Y. 376.

"Public officers are those who are "elected or appointed by other public authorities and thus trace their title to power and authority either immediately or mediately back to the people."

Fox v. Mohawk, 8 H. R. H. Soc. (1901) 165 N. Y. 525.

Officers are "those in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations, for the control of the general interests of society, is confided."

U. S. ex rel Noyes v. Hatch, Pinney's Wisconsin Rep., Vol. 1, p. 183.

"An office is a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial attaches for the time being and which is exercised for the benefit of the public."

High on Extraordinary Legal Remedies, Sec. 620.

The above definition of High was cited approvingly by the Supreme Court of North Carolina in two cases, viz.:

Eliason v. Coleman, 86 N. C. 239.
Doyle v. Raleigh, 89 N. C. 136.

and in the case of

Clark & others v. Stanley, 66 N. C., 59 (1872), Chief Justice Pearson, one of the greatest lawyers this country ever produced, declared:

"A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This we consider to be the true definition of a public officer in its original broad sense. The essence of it is the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State."

"Public officers are officers by whom the government performs its usual political functions—its functions of government."

Sheboygan Co. v. Parker, 3 Wallace, 93.

"Every man is a public officer who hath any duty concerning the public, and he is not the less a public officer when his authority is confined to narrow limits, because it is the duty and the nature of that duty which makes him a public officer and not the extent of his authority. Carthews Rep. 478-479.

Cited approvingly in Bunn v. The People, 45 Ill. 400.

In the case of Robertson v. Clopton, decided in 1881 by the Court of Appeals of Virginia, it was held that members of the House of Delegates of Virginia were officers of the State. These members are voted for under the same franchise clause of the Constitution of 1869 as members of a convention to amend and revise the Constitution; the electorate of the two is identical; the pay the same; the duration of office uncertain, and the character of representative function identical.

The following expressions also occur in the North Carolina cases above cited: "It can make no difference whether there be one act or a series of acts to be done; whether the office expires as soon as the one act is done, or is to be held for years or during good behavior, it is still an office.

"Duration and salary are not of the essence of public office. The duty of acting for and in behalf of the State constitutes an office."

Authorities might be multiplied indefinitely and from every State in the Union to the same effect, but it is sufficient in conclusion to cite the language of Jameson on Constitutional Conventions, a leading authority endorsed by Cooley as leaving nothing to be said on the subject. Mr. Jameson uses the following language:

"In my judgment there can be but little doubt that a member of a convention is, in the enlarged and proper acceptation of the term, an officer of the State * *

* * A convention is a part of the apparatus by which a sovereign society does its work as a political organism. *It is the sovereign as organized for the purpose of renewing or repairing the governmental machinery. That same sovereign as organized for the purpose of making laws is the legislature; as organized for the purpose of applying or carrying into effect laws, it is the judiciary or the executive.*"

It is confidently submitted that the aforegoing authorities establish beyond any doubt that the members of the Virginia Constitutional Convention assembled June 12th, 1901, were officers of the State of Virginia, and as such bound to take the oath of office prescribed by the Constitution under which they assembled.

The oath prescribed by Section 5 of Article III of the Constitution was a condition precedent to the exercise of their functions by the delegates to the convention.

Whatever may be said on the subject in other States, the line of decisions in Virginia is perfectly intelligible and unbroken.

Pursuant to the requirements of the Constitution, an Act of Assembly was passed in 1870 requiring the oath (See Acts 1869-70, Chap. 20, Sec. 1), and that provision has been retained to the present time and now appears as Section 168 of the Code of 1887 as follows:

"Every person before entering upon the discharge of any function as an officer of this State, shall take and subscribe the following oath (being the oath in the Constitution).

As early as 1849 it was enacted and is still in force (Code of 1887, Sec. 182).

"If any officer or person mentioned in Section 168 * * * * * shall act in his office, post or trust.

before taking such oath * * * * he shall forfeit not less than one hundred dollars nor more than one thousand dollars."

Thus we see a penalty imposed for the wrong of personating the incumbent of an office without having qualified to act. But acting, without taking the oath, does not make a person a qualified officer, as is decided by sundry rulings in Virginia. His acts are null and void and of no effect.

As early as 1867 the Court of Appeals of Virginia in the case of Sawyer v. Corse, 17 Gratton, 230, at p. 244, said:

"A mail carrier who does not take the oath, cannot be regarded as an agent and servant of the government, because the Act requires that he shall take the oath before he enters upon his duty."

And in 1883 three cases were decided by the Court of Appeals of Virginia, in which it was held that officers who failed to take the oath of office vacated their offices.

In Johnson v. Mann, Judge, and Couch, Treasurer, 77 Va., 265, it was decided that a Sheriff must qualify before his term began, and for his failure to do so, the office was vacant.

In Childrey v. Bradley et al., 77 Va., 518, it was held that school trustees, acting as such without having taken the oath of office required by law, had thereby vacated their offices, and others appointed in their place were entitled to qualify.

To the same effect is the case of Owen v. O'Brien, 78 Va., 116.

And in the year 1884, in the case of Branhan v. Long, 78 Va., 352, failure to qualify was held to have vacated the office.

All these authorities were called to the attention of

the convention, and it was deliberately warned in advance that, by its refusal to take the oath, its organization would become invalidated, that it would become a revolutionary instead of a constitutional body; that the validity of its organization was essential to the validity of any constitution which it might adopt; and that even if it submitted its work to its own electorate, the objection that it was acting outside of the law would still be valid. The following authority, from the Supreme Court of Pennsylvania, read to the convention, is equally pertinent here.

"Outside of the law, to take the sense of the people whether a convention should be called and the law to call the convention, no other source has been or can be shown. To make this more distinct, let us suppose a voluntary election unauthorized by law and delegates elected. It is plain a convention composed of such delegates would possess no power to displace the existing government and impose a new constitution on the whole people. Those voting at the unauthorized election had no power to represent or bind those who did not choose to vote. A majority of the adult males possessing the qualification of electors can bind the whole people only when they have authority to do so. *To make this still more plain suppose a constitution framed by a volunteer convention assumed to represent the people and attempted to set it up and displace the existing form of government, it is clear that neither the people as a whole, nor the government, having given their assent in any binding form, the executive, judiciary and all officers sworn to support the existing constitution would be bound, in maintenance of the lawfully existing institutions of the people, to resist the usurpation, even to the whole extent of the force of the State. If overpowered the new government*

would be established, not by peaceful means, but by actual revolution."

The above language was employed by Chief Justice Agnew in the famous case of Wells v. Baine, 75 Penn. St. Rep. 39; and in the same volume, it was also said:

"Where a convention to frame amendments to the constitution is sitting under a legislative act, from which all its authority is derived, the submission of its labors to a vote of the people in a manner different from that prescribed by the act is nugatory."

And in the case of Woods Appeal, 75 Pa. State Rep., 59, it was said:

"Such a convention has no inherent rights; it has delegated powers only, and must keep within them."

These cases are cited approvingly by Cooley in his work on Constitutional Limitations. Note to page 44.

We therefore hold that the convention, by failing to take the oath, was not only not organized in accordance with the law, but was not organized at all; that it was a mere volunteer body, whose actings and doings were binding upon nobody whatsoever.

This point is well expressed in the following language used in the debate in the convention:

"There must be something fundamental to be determined as a matter of law. Where a body declares and puts upon its record the fact that its members will not take an oath; and where the taking of an oath is a prerequisite to the validity of their action, it is not a valid body and that cannot shut the door of the court and cannot shut the door of Congress to inquire into that question."

The registration ordinance passed by the convention attached to and promulgated with the constitution and schedules was a nullity.

A convention summoned and assembled to amend a constitution is not the repository for the time being of all the power in a State.

It is summoned for a specific purpose, to wit: to revise the governmental machinery.

All the powers and functions of the government are not poured into its lap.

On the contrary, the constitution in force and the departments of government organized under that when the constitutional convention assembled, go on performing their ordinary functions.

The legislature or law-making power is not abolished nor is the executive department or the judiciary.

The exercise of their powers by a convention is a revolutionary usurpation.

It is unnecessary, since they are running a parallel course to the constitutional body, and are in full life and activity, with their representative duties assigned to them by the existing constitution.

Those duties can be better performed by those to whom they are usually committed. Moreover, it is unsafe to entrust them all to a single assembly.

This would be true even if the power was granted to the Constitutional Convention to establish a constitution without submitting it to the people.

A convention convened to amend a constitution is not convened, either to fill vacancies in the various governmental departments; or to eject from office persons holding positions in the government by regular election or appointment; or to direct such officers in the discharge of their duties.

IT IS ITS BUSINESS TO FRAME A WRITTEN CONSTITUTION: AT MOST TO ENACT ONE.

It has no power, under such a commission, to discharge the public servants and supplant them by its own appointees.

An attempt to remove officers, appoint others in their place and to instruct its appointees in relation to matters of current policy, is a plain usurpation and a blending with it its ordinary normal functions, of those belonging to the legislature of the State.

Behold what this remarkable constitutional convention attempted!

Under laws existing and unrepealed, Registrars of voters existed in every voting precinct of the State. They had been appointed by Electoral Boards created and empowered by acts of the Legislature, and their terms of office had not expired.

The Legislature was actually in session, having simply adjourned. Its power over the creation, change and abolition of these offices was not only undisputed, but in active existence.

It was not fundamental legislation for this convention to turn out these registrars and reorganize the whole system of registration, under officers of its own appointment. It was a mere temporary administrative measure. It did not permanently modify any law, for it expressly relegated the control of legislation on the subject of registrars to the Legislature after 1904.

In a word, it was going altogether out of the business for which the convention was assembled, and usurping powers belonging to a branch of the existing government.

This is as true, if the power granted to the convention was a power to establish the constitution, as it is if the power was to submit its work to the people for ratification or rejection. This work was not in any

sense establishing a constitution; it was something *ultra vires* to the powers of a constitutional convention.

In the Lousiana Convention of 1844 it was proposed that the convention should fill vacancies in the office of parish judges, and the duty of doing so was claimed to be a matter of vital and pressing necessity, but the convention deemed it the assumption of power unwarranted, and rejected the proposition by vote of 68 to 1.

The question of the power of a constitutional convention to eject from office persons holding positions in the government by regular election or appointment was raised in the Illinois Convention of 1862, but the power was not exercised.

Mr. Jameson in his work on Constitutional Conventions, page 320, Section 325-6, declares that the power to fill vacancies in the government must be denied to a constitutional convention in any case, and further says:

"A convention cannot remove from office or instruct those holding office, by any direct proceeding, as by resolution or vote, applying to particular cases. It is its business to frame a written constitution; at most to enact one. It has no power, under such a commission, to discharge the public servants, except so far as their discharge might result from the performance of its acknowledged duty."

As we have never heard any authority cited to the contrary of this proposition, we feel that it is unnecessary to elaborate it further.

The convention had no power to disregard the limitations upon its powers contained in the fundamental conditions imposed by Congress and by the Constitution of the State of Virginia under which it was assembled.

It did so.

We have already set forth the condition imposed by Congress; the proviso of Article 12 of the Virginia Constitution; and the oath required of these members when they assembled.

The convention assembled was not free to disregard those limitations.

It was said: "If that provision in the constitution which attempts to tie our hands, as to the question of changes which we shall make in the suffrage, is valid, then our hands are tied, and we cannot act constitutionally in defiance of them."

That is true, and we propose to show that the hands of the convention were tied at least to the extent of preventing it from enacting such a measure as it did enact.

For the suffrage provisions enacted by this constitution, whether they express the purpose or not, are capable of such administration as to defy and annul every safeguard of the fundamental conditions, and the terms of the proviso in the constitution; and if maintained at all, they must be maintained by upholding the right of the convention to disregard those limitations.

The following extracts from a speech of Hon. George D. Wise on the floor of the Convention, in a debate upon this Constitution, state the outrage of the soldier and suffrage provisions so forcibly that we quote them at length. Speaking of the understanding clause and soldier clauses he said:

"If this provision, fair on its face, shall be embodied in the organic law of Virginia, and then afterwards shall be so applied by public authority as to amount practically to prohibited discrimination or the denial of equal justice, the person thereby injured, in my opin-

ion, would have the right of appeal to the courts, and I doubt not that in a proper case redress would be afforded. * * * * * It will not, I think, be seriously denied that such a clause might be applied and administered with an evil eye and an unequal hand. Here we have the 'Grandfather Clause,' with all its hideous features. Gentlemen, I am not going to insult your intelligence by debating the question whether it is constitutional. Its purpose, to take away from the negro the privilege of the franchise on account of race, color, or previous condition of servitude, is written in the largest letters right upon its face. But its most objectionable feature is the proposition to establish the hereditary qualification for the suffrage, and the same feature appears in the Glass plan, wherein soldiers and their lawful descendants are exempted from the requirements imposed upon other applicants for registration, that they shall be able to read any section of the Constitution submitted to them by the registrars, and give reasonable explanation of the same; or, being unable to read, shall be able to understand and give a reasonable explanation thereof, when read to them by the officers of registraton. Political rights and privileges are not inherited in America. When the colonies inaugurated the revolution and established free government here upon the North American continent, it was done in resistance to the odious doctrine that offices and privileges should descend from father to son. The Democratic party has denounced in unmeasured terms the imperialistic tendencies in this country, manifested in territorial extension as a consequence of the war with Spain, and in the manner of governing the provinces thus acquired; but here we are asked in the proposition to revive hereditary privileges, to violate an essential principle of our Democratic Republic.

I have a letter here from Hon. John Morgan, Senator from Alabama, one of the strongest, bravest and most eloquent representatives of the South. It was written to a member of the Constitutional Convention of his State in reference to a provision similiar to that which I am considering.

Dear Captain White: The American Revolution was not so much a redress of grievances as it was a struggle to abolish heredity in government. That was the real line of division between Democratic and Regal government and the church established by law. Heredity disappeared, with its associated rights of perpetuity in the ownership of lands, and many minor hereditaments of feudalism, such as titles and tenures and servitudes, when our new Democratic scheme of government was instituted.

Political heredity and all its appurtenances, such as perogative and titular nobility and primogeniture, and all its protecting laws, such as corruption of blood. premunire and excommunication, perished and were placed under the heel of prohibition by our Constitution. Whoever would restore any of these to that extent discredits the cause of the Revolution.

Without suffrage the new system had no possible means of expressing the sovereign will of the people in laws and their enforcement by executive and judicial authority.

These necessary agents of the government by and for the people can only be chosen by voters; and voters could only be created by law, not by inheritance. These voters are chosen representatives to perform the single function of electing the lawful officers of government.

The trust confided in them is personal, and can neither be sold nor delegated, transmitted by inheritance or by will to any other person. It is this quality

ot non-transmissiblity that distinguishes it from the regal form of inheritable power and marks the line of the impassable gulf between regal government and Democratic government. The voters, as a class, or body, have certain physical conditions, such as age and sex, that are necessary qualifications, and certain moral and political qualifications that are personal and independent of inheritable blood.

To make blood the medium of transmitting the electoral power from father to son is to uproot from its foundations the whole system of Democratic government and to reinstate the system and the form of regal government.

The Fourteenth and Fifteenth Amendments have no more to do with this subject than any other part of the organic law.

The transmission ot the electoral power by the blood of inheritance from father to son would destroy all distinction between regal government and Democracy, and would throw the door wide open for a return to the system that the American Revolution abolished. The steps would be few and would be rapidly taken, to the complete restoration of monarchy, so soon as we give to any class of voters the power to qualify their sons as voters by inheritance. In this case it is the first step that tells with fatal and irrevocable effect. The argument is irresistible, that offices should follow the blood if the power that creates them is the blood of inheritance; and this is all that is meant in the British system of titled nobility which alone legislates in the House of Lords and of regal blood and prerogative which upholds the throne, and the power of appointment to office, which is an appanage of the throne and the pardoning power over which the people have no control. * * * *

When such a titled class of voters is created by the organic law it will soon occur to them that no other class should be allowed to note, and they will usurp all power. It is far from being a comfort to me that some negroes are included, and many white men are left out, by the ordinance reported by the majority of the Committee on Suffrage in this ordinance of inheritable blood.

With great respect,
JOHN T. MORGAN.

Warm Springs, Va., July 6th.

Mr. Glass: May I interrupt my friend right there to ask a question? Is it not a fact that notwithstanding that letter from Senator Morgan, the Alabama Constitutional Convention, with great unanimity, rejected his advice and adopted this clause?

Mr. Wise: Conventions very frequently do such foolish things. It is true that the Alabama Convention adopted this clause. I do not know by what majority it was done, but do know that four of its ablest members denounced it as un-Democratic, un-Republican and un-American, as their gifted Senator had done. I had the honor to serve with one of them on the floor of the House of Representatives in Washington, and he was afterwards the Governor of Alabama. He wears an empty sleeve as the result of his devotion to the South, the Hon. William C. Oates. I will briefly quote the language of the protest of the four gentlemen to whom I allude:

'It (the clause in question) establishes a permanent hereditary governing class, which in un-Democratic, un-Republican, and un-American. It is not in keeping with the dignity of a progressive, just, and enlightened State. It insults'—I ask the special attention of the

able and eloquent gentleman from Lynchburg to this—'it insults the white men of Alabama and proclaims their inferiority to the negro by requiring of them as suffragists a lower standard of capacity and intelligence than that required of the negro. It is impracticable of administration.'

Mr. Glass: Just there I would say to my friend that the white men of Alabama went to the polls—those white men who were insulted—and endorsed that very clause.

Mr. Wise: *Oh! yes, sir; but it has not yet been under the inspection of the Supreme Court of the United States. The question as to the validity of a provision in the organic law cannot be determined by a popular election.* 'It is impracticable of administration, owing to the impossibility of tracing with any certainty descent from remote ancestors.'

"But I have another serious objection to the understanding clause contained in the minority plan. It gives to the registrars the right to select the section of the constitution, of which the applicant for registration must be able to give a reasonable explanation.

* * * *

It clothes the registrar with the absolute power to determine what clause of the Constitution shall be submitted to the applicant for registration. Let us take an illustration—not a negro—discard, if you please, the negro from your minds. Suppose that in the midst of political excitement, when passion runs high and partisan zeal is without proper restraint, a white man should apply to the registrar to have his name put upon the rolls. The registrar could submit to him—it is absolutely within his power, under the provisions of this plan, to submit to him—a clause in the Constitution, which the most learned and able lawyer might

find it difficult to understand and give a reasonable explanation thereof. The registrar might submit to an unlettered white man, for explanation, a clause which the judges of the Supreme Court of the United States, or of the Court of Appeals of Virginia, might not be able to agree upon. It will not do to say that an appeal is given from the decision of the registrar to the circuit judge because in that event it would be only within the competency of the judge to decide whether he had given a satisfactory explanation of the clause submitted to him.

In this way, gentlemen of the conference, not only the negro, but the white men of this Commonwealth, would be put in the power of ignorant and depraved registrars, so that one applicant for registration might be subjected to a test entirely different from that to which another might be required to conform. The doors are left wide open for discrimination, and for corruption and fraud."

The language of the suffrage clause in the ordained constitution is as was so forcibly pointed out by Mr. Wise, of itself sufficient to show this purpose; but whether it is sufficient or not, the pleadings aver that in practical operation the law is administered by the public authorities with an evil eye and an unequal hand, so as to make the class complaining of its operation subject to an intolerable discrimination.

Yick Wo. v. Hopkins, 118 U. S., 356.

And the Court below and this Court here, by the manner in which the case was considered and disposed of below, must so regard the administration of the suffrage provisions of the ordained constitution.

The Convention, by its spokesman and its action, and the defendants, by their representatives in the

Court below, denied that the fundamental conditions of the Act of Congress and the proviso of the Constitution of 1869 were binding upon the convention. It was contended as follows:

"The people of one generation, or the people of one time, have no right to bind their posterity, and any effort that is made by the peole of one age, one time or one generation to prescribe the form of government which their posterity shall adopt is absolutely null and void as being beyond even the competency of the people."

Again it was said: "It is not a valid provision of the constitution which attempts to tie the hands of posterity in reference to the character of the changes that the people may make."

Again the fundamental conditions of the constitution were described as provisions "beyond the natural right of the people and in derogation of their inalienable power."

In the argument below this assertion was reiterated, and if there is any other ground upon which the federal law and the constitutional proviso are claimed to be null we have yet to hear it.

This talk seems to have pleased the members of the convention and to have satisfied the representatives of the defendants in the Court below, but we submit that in the light of history and in view of the relations, which the State of Virginia bears to the federal government, it is simply "airy persiflage."

States do not exist by generations. Their laws are not made for generations. Laws enacted by an independent sovereignty, affecting none but its subjects and creating no obligations to any other sovereign, may

be repealable by succeeding powers of the State and subject to no review, however, they may reverse the preceding legislation or policy of the State. Such laws enacted by such a State may be revocable, however they may violate pledges to the citizens of the State or disregard the plighted faith of the sovereign to his people, or the majority to the minority of its citizens. In such a State, independent of any other sovereignty, a citizen may be at the mercy of the sovereign will, or the will of the majority. In such a State the right of self government may be inalienable. In such a State the words of the Virginia Bill of Rights may apply:

"That when any government shall be found inadequate or contrary to these purposes (to the purposes of happiness, etc.) a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."

Is Virginia such a State?

Is not the language of her Bill of Rights necessarily qualified by her membership of the Federal Union?

Unless it is, the Federal Union is nothing, and the doctrine of nullification is more firmly established than ever before.

Unless this is true, the language of the Federal Constitution subscribed to by George Washington, John Blair and James Madison as follows (Art. 6, Sec. 2) means nothing:

"This Constiution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, *shall be the supreme law of the land, and the judges in every state shall be bound thereby any thing in the Constitution or laws of any State to the contrary notwithstanding.*"

While the discussion of this doctrine of the inalienable rights of Virginia was in progress, there was but one allusion to the fact that those inalienable rights were "not to be asserted as trenching upon the Constitution of the United States, which we must keep forever in our eyes."

Even that speaker, while making the concession to the constitution, said nothing of the laws of the United States which shall be made in pursuance thereof.

In fact, although that convention assembled within about one hundred miles of the national capital, there was little to suggest that federal constitution, federal laws or pledges to the government were to be considered as entering in any degree into the deliberations of that body. It seemed as though the masterpart of the federal authority thirty years before, in framing the constitution which it was sought to revise, had been forgotten, and one exuberant orator went so far as to say "they did not wish to bind the men who had turned their faces to the future, and to a better order of things by an oath-bound proposition, which bound them to the dead body of the past; did not wish to put upon any people an oath; tie them up so that they will not to-morrow or next year, or thirty years afterwards, do anything which the necessity of that age may call for, in a particular way."

In a word the fact that Virginia had given any pledges to the United States, or that the United States had exacted any condition from Virginia thirty years ago concerning the fundamental law of Virginia, was lost sight of by the convention in framing the "inalienable rights" of the State, into a fundamental chart of government.

The radical vice of all this consisted in ignoring the fact that Virginia is a part of the Federal government

and not a law unto herself; that the federal government, by an act of January 26, 1870, had required of Virginia the condition "that the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States, of the right to vote, who are now entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now found to be felonies at common law."

It was no more competent for Virginia to disregard that condition now than it was thirty years ago.

It is true that the validity and binding force of that particular condition has never heretofore been directly involved in any suit; but it would have been well if the persons who treated it as a nullity had considered other litigations in which substantially the same question was involved.

By an Act of Congress, dated June 25th, 1868 (15 Stat. at Large, p. 73) admitting the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida to representation in Congress, the following fundamental conditions were imposed:

"That the Constitution in neither of said States shall ever be so amended or changed as to deprive any citizen, or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the Constitution thereof herein recognized."

In the case of White v. Hart, 13 Wall., 646-649, which involved the Constitution of Georgia adopted in 1868, by virtue of the Act of Congress last cited, it was contended by counsel, among other things, "that her Constitution was adopted under the dictation and coercion of Congress, and is the Act of Congress rather than of the State; and that, though a State cannot pass a law impairing the validity of contracts, Congress

can, and that for this reason also the inhibition in the Constitution has no effect in this case."

Replying to that suggestion, Mr. Justice Swayne said:

"Congress authorized the State to frame a new constitution and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress, and was so received and so recognized in the subsequent action of that body. *The State is estopped to assail it upon such an assumption.* Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. *The Act of Congress upon the subject cannot be inquired into.* The case is clearly one in which the judicial is bound to follow the action of the political department of the government and is concluded by it.

The legislation of Congress on the subject of reconstruction has been considered in a great number of cases.

In the case of Texas against White, 7 Wall., 728, the Chief Justice of the United States declared, speaking of the State of Texas in language equally applicable to Virginia:

"The restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible, and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation and afford adequate security to the people of the State."

"In the exercise of the power conferred by the guar-
"antee clause, as in the exercise of every other constitu-
"tional power, discretion in the choice of means is
"necessarily allowed. It is essential only that the

"means must be necessary and proper for carrying into "execution the power conferred through the restora- "tion of the State to its constitutional relations under "a republican form of government, and that no acts "be done and no authority exerted, which is either pro- "hibited or unsanctioned by the constitution."

In the case of White v. Hart, 13 Wall. 646, Mr. Justice Swayne said:

"At no time were the rebellious States out of the pale of the Union. Their rights under the constitution were suspended but not destroyed. Thier constitutional duties and obligations were unaffected and remained the same. A citizen is still a citizen, though guilty of crime and visited with punishment. His political rights may be put in abeyance or forfeited The result depends upon the rule as defined in the law of the sovereign against whom he has offended. If he loses his rights he escapes none of his disabilities and liabilities which before subsisted. Certainly he can have no new rights or immunities arising from his crime. * * * * The legislation of Congress shows that these were the views entertained by that department of the government. * * * * We think it is conclusive upon the judicial department of the government."

Again in the case of Texas v. White, p. 774, it is said:

"The new freemen necessarily become part of the people and the people still constitute the State; the States, like individuals, retain their identity, though changed to some extent in their constituent elements. It was the State thus constituted which is now entitled to the benefit of the constitutional guarantee."

In the cases of United States v. Rees et al., 92 U. S., 214, and United States v. Cruikshank, 92 U. S., 542.,

the power of the government to sustain the rights of citizens and to grant jurisdiction to the federal courts, for the protection and enforcement of those rights, was recognized; and although it was held in those cases that Congress had not provided criminal remedies, the power to grant both civil and criminal remedies was fully recognized, and the civil remedies have been sustained as constitutional. See:

Ex parte Yarbrought, 110 U. S., 655.

Wiley v. Sinkler, 179 U. S., 58, decided in 1900.

Swafford v. Templeton, 185 U. S., 487, decided May 19, 1902.

The State of Virginia is estopped from denying the validity of the fundamental condition imposed by Congress.

She held an election July 6th, 1869, ratifying the constitution, which it is now sought to nullify. She appealed to Congress to admit her upon the terms of that constitution.

She accepted the fundamental condition imposed by Congress and pledged herself to observe it, not only as expressed in the act, but as embodied in the constitution itself.

She was admitted upon her plighted faith and acted under the constitution from 1870 to 1902. Under its provisions all of the elections were held; all her laws were passed; all her official acts were done. In all that period she never said or did aught to question the sanctity of her plighted faith, or the validity of the reconstruction acts.

Can she now repudiate after thirty-three years of loyalty?

Estoppels run against States as against individuals. See:

2 Hermann on Estoppel, Sec. 76-7-8 and 1128.

Especially is this true as to estoppel by legislative enactment.

Watson v. Mercer, 8 Peters, 88.
Sheets v. Shelden's Lessee, 2 Wall., 177.
Branson v. Worth, 17 Wall., 32.
White v. Hart, 13 Wall., 646-649.

In the case last cited it is said, concerning the plea that Georgia acted under coercion:

"The State is estopped to assail it upon any such assumption. Upon the same ground she might deny her ratification of the validity of the constitutional amendments. The Acts of Congress upon the subject cannot be inquired into."

The conditions imposed by Congress do not degrade the State and were not different from those which have been imposed upon other States upon their admission into the Union, and in many instances the conditions so imposed have been either proposed by or voted for by the State of Virginia. When Nebraska was admitted into the Union (See Act of Congress, Feb. 9, 1867, Sec. 3) a fundamental condition was imposed upon her, which was acquiesced in (See laws of Nebraska, 1867, pp. 28-31.)

For a full history of the Act of Congress and her admission thereon see Brittle v. People, 2 Nebraska, 198 and the majority opinion of the Court raises and answers every objection ever suggested, either in the convention or in the argument below, concerning the validity and binding force of those fundamental conditions.

The other cases of fundamental conditions, upon

which States have been admitted, have been hereinbefore referred to and will not be repeated, but a most instructive discussion under the head of "Are the States equal under the Constitution" will be found in Dunning's Essays on the Civil War and Reconstruction, pp. 304 to 352. The author demonstrates that the States, with the exception of the original thirteen, have all been limited and confined, in greater or less degree, by restrictions, conditions and limitations imposed by Congressional enactment. His summing up is as follows:

"In brief it may be summed up thus: Ohio, Indiana, Illinois, Michigan, Wisconsin, Mississippi, Alabama, Louisiana, Arkansas, Minnesota, Iowa, Oregon, California, Kansas, Nevada, Nebraska, Colorado, Montana, the two Dakotas, Washington and Utah have not the right, enjoyed by the original States, of discriminating in land-taxation against citizens of the United States who are not citizens of any State; Ohio, Indiana, Illinois, Michigan, Wisconsin, Louisiana, Mississippi, Alabama, Nevada, Colorado, Montana, the two Dakotas, Washington and Utah are forbidden to establish any rule interfering with the freedom of worship or religious sentiment, while no such prohibition rests upon the other States; Montana, Washington, the two Dakotas and Utah are required to establish non-sectarian systems of public schools; Utah is forbidden to permit the existence of polygamy; Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Arkansas, Louisiana, and Texas are forbidden to amend the franchise clauses of their constitution in certain respects as to which the rest of the States are free from restraint; and finally, Virginia, Mississippi and Texas are forbidden to make race, color or previous condition of ser-

vitude a disqualification for holding office, or to amend their constitutions so as to deprive any citizen of the United States of the school privileges secured therein."

Having thus, as we think, demonstrated that the fundamental conditions imposed by Congress and the limitations of the Constitution of 1869, upon the right to alter the suffrage, were binding upon the Virginia convention, we insist that the Court should have entertained jurisdiction of the case, and, seeing that both the Act of Congress and the proviso of the Constitution had been grossly violated, should have declared the constitutional provisions upon the elective franchise null, void and of no effect.

Much was said in the Court below about the case of Williams v. Mississippi, 170 U. S., 213, decided by this Court in 1898.

That case had no bearing whatever upon this. The decision turned upon the contention that the fundamental clauses in the Constitution of Mississippi denied the equal protection of the laws to all classes contrary to the XIVth amendment of the Constitution. But the Court disposed of the case upon the single question that the provisions for registration did not on their face and in the abstract discriminate between classes, however, the opportunities for discrimination given to the officers might be abused. It then said that there was no evidence of such abuse, and refused to argue from the probable to the actual, in that particular case, in order to construe the provisions as contrary to the XIVth amendment.

But the Court went further also. It planted its decision solely upon two propositions:

1. That the Constitution of Mississippi and its statutes did not *on their face* discriminate between the races, and

2. That in that particular case, owing to the peculiar manner in which the question had been raised, *it had not been shown* that the actual administration of the law was evil. Drawing itself within its narrow sphere, it avoided deciding anything more.

But, as if to intimate what it would have held upon another State of pleadings and proof, it referred approvingly to the decision of the Supreme Court in the Yick Wo case and the authorities cited, in which the facts are not unlike those in these cases, and the rulings are all in favor of our contention.

In the Yick Wo case, thus cited approvingly, many things pertinent to this case were decided, among them the following:

1. That an ordinance conferring arbitrary power to give or withhold certain rights, without regard to the competency of applicants and without regard to discussion in the legal sense of the term, was void as repugnant to the XIVth amendment, and

2. *That a law, however fair on its face and impartial in appearance, if it is applied and administered* by public authority *with an evil eye and an unequal hand, will be held as violating the rights of citizens of the* United States

In this case, unlike the Mississippi case, the fact that the laws are enacted and administered by public authority with an evil eye and an unequal hand are concessums of the pleadings.

The constitution, schedules and ordinances complained of are null, void and of no effect.

It was admitted in the Court below by the Attorney General that the party conventions of Virginia did give

the pledge to the people to submit the constitution to popular vote, and the only suggestion of justification for what actually was done, was the blunt and blurted reluctant reply that the people had the right to change their minds.

There was no pretence that the people ever were consulted. The people who changed their minds were the people, who, after their election, changed their minds about redeeming their pledges to submit the constitution. The people who would have Virginia forget her pledges about respecting the old constitution. They are 47 men a majority of a quorum of one hundred men.

The Constitution of Virginia of 1869, Article XII, Section 2, provided that at such time as the General Assembly might by law provide, the question "Shall there be a convention to revise the Constitution and amend the same?" should be submitted to the people and decided by the electors qualified to vote for members of the General Assembly.

Pursuant to that an Act of the Assembly of Virginia (Acts of 1899-1900, p. 835) was approved March 5, 1900, submitting the question to the electors at an election to be held the fourth Thursday of May, 1900.

Provision was made for taking and certification of the vote. The vote was certified, as required by the act.

By another act of the extra session of the Virginia Legislature, approved February 16th, 1901, (Acts of 1901, p. 62) provision was made for the election of delegates and the assembling of the convention.

The constitution itself was silent upon the question whether the work of the convention should be submitted to the people for ratification or rejection. Certainly no power in the convention to act definitely is to be inferred from that silence.

Such an inference is in derogation of the right of the people to pass upon the work of their own servants.

All text writers declare that such a power is not to be inferred. It must only rest upon an express delegation of authority.

The care taken in the Constitution of 1869, that the people should have a voice in determining whether even special amendments should be ratified or rejected, demonstrates that they had no intention to give any convention power to ordain an entire revision.

Article XII provided for special changes always preserving and guarding the rights of the people. If such special changes were proposed and agreed to by a mojority of one Legislature, it was necessary that they should be entered on their journals with the ayes and noes taken thereon and referred to the next General Assembly to be chosen at the following general election.

So jealous of their rights were the people that the Constitution required those proposed changes should be published for three months previous to the next election; and, even then, if the next General Assembly approved them, it was required to submit them to the people in such manner and at such times as the General Assembly should prescribe.

Thus we see that the smallest amendment of the constitution required popular sanction, after full notice of its character to the people; and we also see that the General Assembly was empowered to enact laws to submit proposed special amendments to the people in such manner and at such time as it saw fit.

When we see such particularity about special amendments and the constitution is silent about the manner in which general amendments and revisions should become operative, can we doubt the power of the General Assembly to provide for the submission of such

general amendments to the people in such manner and at such times as it saw fit?

The General Assembly was the only representative of the people in existence, empowered to determine how a question of that kind should be submitted to the people. It was the only existing representative of the people and whether it had or had not originally expressly granted power to prescribe that a general revision should be submitted to the people for ratification or rejection, the people ratified the exercise of that power by voting for delegates under the proviso of the act that the work of those delegates should be submitted to them. And the delegates elected submitted their candidacy and received their votes under that proviso of the act, and are estopped from denying their election, subject to that qualification, after election under the act and subject to that condition. It was as much a part of the act under which they claim title, that their work should be submitted for ratification or rejection to the people of Virginia as that they should be delegates if they received a majority of the votes. They are estopped by the preamble of the act which declares: "It is now proper to provide plans for the selection of delegates to such convention for the convening of such delegates and the organization of said convention, *and for submitting the revised and amended constitution to the people of the State for ratification or rejection.*"

They were estopped, moreover, by consenting to be candidates for election under the act, the 12th section of which made it obligatory upon them that if their work was finished before October 5, 1901, it should be submitted to the qualified voters of the Commonwealth for ratification or rejection at the general election November 5, 1901; and by the 17th section of the act

which provided that if their revision was not completed before October 5, 1901, it should remain for the next General Assembly to enact such measures as it might deem proper for submitting the constitution to the people for ratification or rejection.

When they presented themselves to the people for election, under the Act of Assembly, the parts of the act which compelled them to submit their work became as obligatory upon them as the parts which made them delegates. This is independent of the confessed fact that during the whole time of their candidacy, both by personal pledge and by party resolutions, they held themselves out as candidates for a limited agency to frame and propose changes and not as candidates for definitive authority to ordain the changes which they might propose. They could no more enlarge the authority conferred upon them, after election under the act which limited it, than they could have changed a power of attorney in a private transaction from a limited and revocable to an unlimited and irrevocable delegation of authority.

The authorities upon this question are overwhelming and absolute.

The talk of members of the convention about the exalted character of their functions is as absurd and stilted as the half civilized proclamations of Venezuela announcing that she is "a cultured nation."

The precedents invoked for such authority do not sustain the pretention at all.

The case of Miller v. Johnson, 92 Kentucky, 589, was seriously cited upon the floor of the convention as justifying the abandonment of all pledges.

The case is not in the least degree pertinent to the issues here. It arose in a State Court upon the issue

whether the judiciary of a State would go counter to the political department of the State in declaring that a constitution was void which had been recognized as valid by the other departments of the State.

The facts of the case in no respect resemble the facts in this case. The Kentucky convention had been elected and required to submit its work to the people. It had enacted the constitution and submitted it to the people, and the constitution was ratified by a popular vote while the convention was adjourned.

The constitution was ratified by a handsome majority. The convention was proud of its work. When it reassembled, flushed by the assurance of popular confidence, it undertook to polish off the phraseology of the instrument as it had been submitted to the people. The changes were principally verbal changes, not material, and they were accepted by the executive department. The constitution thus beautified and adorned, so to speak, but unaltered in substance, was treated as in force for some time before any question arose concerning these changes. Then the question was raised in the State Court and the State Court declared that the changes were not important at most, but that the judiciary of the State felt compelled not to go counter to the recognition of the political department of the same State in declaring the constitution void which had been recognized as valid by the political department.

The decision is most valuable in support of our views, for it plainly declares that as an original proposition a convention assembled under an obligation to submit its work to the people had no right whatever to ordain or proclaim it, and for the further reason that it shows that, however the comity invoked in that cause may exist between several co-ordinate depart

ments of a State government, it is not applicable to a Federal Court, which owes no recognition upon constitutional questions to any department of a State government.

In support of the last proposition we cite the case of Wells v. Bain, 75 Penn. St., 39, which declares: "Such a convention has no inherent rights; it has delegated powers only, and must keep within them."

Von Holst's Const. Law (1887) p. 264 thus denounces the practice of proclaiming.

"Conventions are instruments which the people use for reasons of expediency in constitution making; but their task should always be limited to drafting a plan of a constitution, &c.

It has repeatedly become of the greatest political significance, that conventions—partly by appealing to precedents in the struggle of the colonies with the mother country, and partly in imitation of the convention of the first French revolution—have claimed to be the bearers of the people's sovereignty—a claim that in its final logical results tends to a complete overturning of the fundamental principle of American popular government, that is, transforms popular sovereignty into its very opposite.

This doctrine, which rests on the logical absurdity of a transfer of sovereignty, which is identical with its entire alienation, is constantly losing ground."

Jameson on Cons. Conventions (1887) pp. 490-541.

Cooley Cons. Lim. (1890) p. 43.

Cooley, discussing the formation and amendment of State constitutions, says:

"II. In the original States, and all others subsequently admitted to the Union, the power to amend or revise their constitutions resides in the great body of

the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all State authority, have power to control and alter at will the law which they have made. But the people, in the legal sense, must be understood to be those who, *by the existing constitution,* are clothed with political rights, and who, *while that instrument remains,* will be the sole organs through which the will of the body politic can be expressed.

III. But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be authorized to speak for the people, upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself.

IV. In accordance with universal practice * * amendments to an existing constitution or entire revisions of it, must be prepared and matured by some body of representatives chosen for the purpose. * * It is obviously impossible for the whole people to meet, prepare, and discuss the proposed alterations, and there seems to be no feasible mode by which an expression of their will can be obtained, except by asking it upon the single point of assent or disapproval.

But no body of representatives, unless specially clothed with power for that purpose by the people when choosing them, can rightfully take definitive action upon amendments or revisions; they must submit the result of their deliberations to the people—who alone are competent to exercise the powers of sovereignty in framing the fundamental law—for ratification or

rejection. The constitutional convention is the representative of sovereignty only in a very qualified sense and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass, but the changes in the fundamental law of the State must be enacted by the people themselves.

Cooley's Cons. Limit. (1890) pp. 42, 43 and 44.

Citing: Jameson on the Cons. Convention, Secs. 415, 418, 479, 520.

Some Rare Contrasts.

The portions of the Constitution incorporated in this brief present a ghastly satire upon constitutional government by the majority of the people.

The preamble recites "that the General Assembly of Virginia provided by law for the election of delegates to the constitution, *in pursuance whereof the members of this convention were elected by the good people of Virginia.*"

The act of Assembly referred to, commanded the convention to submit its work to the people.

In its very next recital, the preamble, describes the delegates themselves as the people of Virginia expresses gratitude to God for his past favors and "ordains and establishes" the Constitution; not in pursuance of, but in spite of, the law under which the delegates assembled.

The Bill of Rights, in juxtaposition to the Catalogue of Wrongs upon the elective franchise, reads like a travesty of popular sovereignty.

FIRST.

Article I proclaims that all men are by nature equally free and independent and have certain inherent rights of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.

Article II thereupon proceeds to deprive at least two-fifths of their constituency of the enjoyment of liberty or the right to participate in laws regulating their ownership of property, and leaves their happiness and their safety at the mercy of a government in which they have no voice.

SECOND.

Article I proclaims that all power is vested in and consequently derived from the people; that magistrates are their trustees and servants, and at all times amenable to them.

The Schedule shows that the magistrates who made this declaration refuse to be amenable to the people or to submit their work to them for their approval or rejection, as they were pledged to do; and, declaring that all power is vested in the people and derived from them, undertakes to place the people without their consent, under the fiat government of forty-seven men.

THIRD.

Article I declares that government is, or ought to be, instituted for the common benefit, and that form is best which is capable of producing the greatest degree of happiness and safety, and most secure against maladministration, and that the right to

reform, alter or abolish governments is the right of a majority of the community.

Article II exemplifies this principle by ignoring the will of the majority of the community, by violating the pledges of the delegates, by attempting to institute a government for the benefit, in perpetuity, of a factional oligarchy, with no security against maladministration, with the power of continuing itself indefinitely, in spite of the will of the majority.

FOURTH.

Article I declares that no men or set of men are entitled to exclusive or separate emoluments or privileges, except in consideration of public service and against the principle of heredity.

Article II bestows the right of suffrage, one of the most precious of all popular rights, upon men possessing no other title than that their fathers had been soldiers. It recognizes heredity of the most obnoxious kind, for the father may have been a deserter, and the son may be illegitimate, or even the black son of a white father, and still be eligible to the boon of suffrage bestowed by these patriots.*

FIFTH.

Article I declares that the legislative, executive and judicial departments of the State should be separate and distinct.

Under Article II the Convention, elected for the special purpose of framing a constitution, usurped legislative powers to enact temporary legislation and coerced the executive and judiciary departments by imposing test oaths of allegiance to its work, thus combining all three departments in itself.

* NOTE. We are credibly informed that under this claim a mulatto man registered in one of the Counties of the State, as the "son of a Soldier," and named a Lieutenant-General in the Confederate Army as his father. Thus was registered lawfully a mulatto bastard, under the provision.

SIXTH.

Article I declares that all elections ought to be free and that men having a permanent common interest in and attachment to the community, have the right of suffrage and cannot be taxed or deprived of or damaged in their property, without their own consent, or that of their representatives duly elected or bound by and laws to which they have not in like manner assented for the public good.

Article II proceeds to destroy the lawfully existing electorate of the State; to appoint the designated minions of the convention to restrict the right of the people to vote; to determine who have a permanent common interest with and attachment to the community; to provide for taxing the property of at least two-fifths of the voters of the Commonwealth without their consent; to take from them the right of representation; and to govern them by laws to which their consent is not asked and in framing which they are deprived of all voice.

SEVENTH.

Article I declares that all power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and ought not to be exercised.

Article II, without authority, without the consent of the Legislature, proceeds to suspend existing laws, to put new and invalid laws into execution, and to ordain its own work without submitting it to the people.

EIGHTH.

Article I declares that no man shall be deprived of his life or liberty, except by the laws of the land or the judgment of his peers.

Article II deprives one hundred thousand men of their liberty and their franchise; places their lives in the hands of others, not by the law of the land, or the judgment of their peers, but by the fiat of less than a majority of the convention; defies the law under which it assembled and shamelessly violates the pledges of its members to the people who elected them.

The Schedule demands an oath of allegiance to the work of the convention from every officer in the State, although the delegates to the Convention refused to take or be bound by any oath.

This is the case presented to the Supreme Court of the United States by one thousand outraged citizens of the United States, whose rights as citizens of Virginia have been guaranteed to them by the general government, and stolen from them by a band of usurpers as shameless and defiant as any pirates that ever strode a quarter deck upon the high seas with cutlass and boarding pike.

It is respectfully submitted that they have a case cognizable and determinable under existing federal laws in federal tribunals, and that they are not bound to assert their rights in tribunals of a State whose liberties have been seized by a faction of her people maddened by race prejudice and dead alike to the dictates of humanity, conscience or plighted honor.

Appellants are advised and believe that they will not be turned out of the federal tribunals upon any narrow technical plea of a lack of jurisdiction.

Our wide-spreading tree of Constitutional Liberty, in the grateful shade of which the oppressed of all Na-

tions find rest and peace, is rooted in a soil which was watered by the tears of restless vassals, and is enriched by the blood of rebellious bondsmen, shed lavishly, until they won their struggle for freedom.

Until now, its three great limbs, co-ordinates in the germ, have grown apace, in harmonious development. For over a century they have expanded symmetrically. Each branch, in turn, has brought forth fruit worthy of the parent trunk, in proof that its vital forces were equally distributed from root to trunk and trunk to bough, producing a noble trinity of life, power, strength, and beauty. Each branch has contributed its full share to the glories of the whole: each has in due time borne its burdens.

Has the time come at last when the cut-worn of special pleadings, the blight of self-inflicted doubts, is to sap the growth of one of these great co-ordinates, dwarf it, wither it, and destroy that symmetry of which it is a glorious integral part?

Let it not be said that it failed in strength and life just when it was called upon to preserve liberty and vindicate the supremacy of federal power.

If so it must be we have, indeed, entered upon a new era of Construction.

For over a century the judicial power of this Nation was not interpreted as that of a weak and circumscribed subordinate.

In the past is has played its part, and taken its place, as one of the three great co-ordinate repositories of National authority—nor has it hesitated to assume its lawful authority and enforce its lawful mandates.

In the infancy of the Republic, under the leadership of the great Chief-Justice, it taught the States what sovereignty they had delegated to the Nation.

In the time of State jealousies and antagonisms, it

fearlessly proclaimed to embittered sisters, what, under their bond of Union, they owed to each other.

Silent in war, it was only silent until war culminated in a triumph of Union, which threatened the autonomy of the States.

Then, the federal judiciary spoke again. In the slaughter house decisions, it stretched forth its arms across the troubled waters, and bade them "Peace Be Still." Over the shouts of the conqueror—above the wailings of defeat—its voice was heard—proclaiming what the victor had not won, what the vanquished had not lost—that both should thenceforth stand upon a platform of well-defined rights and duties, of mutual respect, whereby alone that patriotism without which Nations die, might, in time, be restored.

And the Nation, "an indissoluble Union of indestructible States"—the Nation, North and South, accepted its new baptism. Thenceforth it grew not only as a more perfect Union, but daily increased in reverence for the great arbiter, which, unmoved by passion, undismayed by tumult, did Justice.

These things were not accomplished by any weakling.

They are the labors of a giant—accomplished with a giant's strength—proclaimed in a giant's voice.

Nobody has denied that power or questioned that strength.

Nobody has defied those commands. Nay, the people acknowledge it, rejoice in it, and bless the beneficent dispenser.

Once more the federal judicial power is confronted with a great question, as much committed to its keeping as to either of its co-ordinates.

That question is:

May the Status of Citizens of the United States of a particular race—a Status definitely declared by federal laws—be altered by any State or States, in defiance of federal power, in breach of the plighted faith of the States to the Nation?

In our humble judgment something more than the rights of the Complainants is involved.

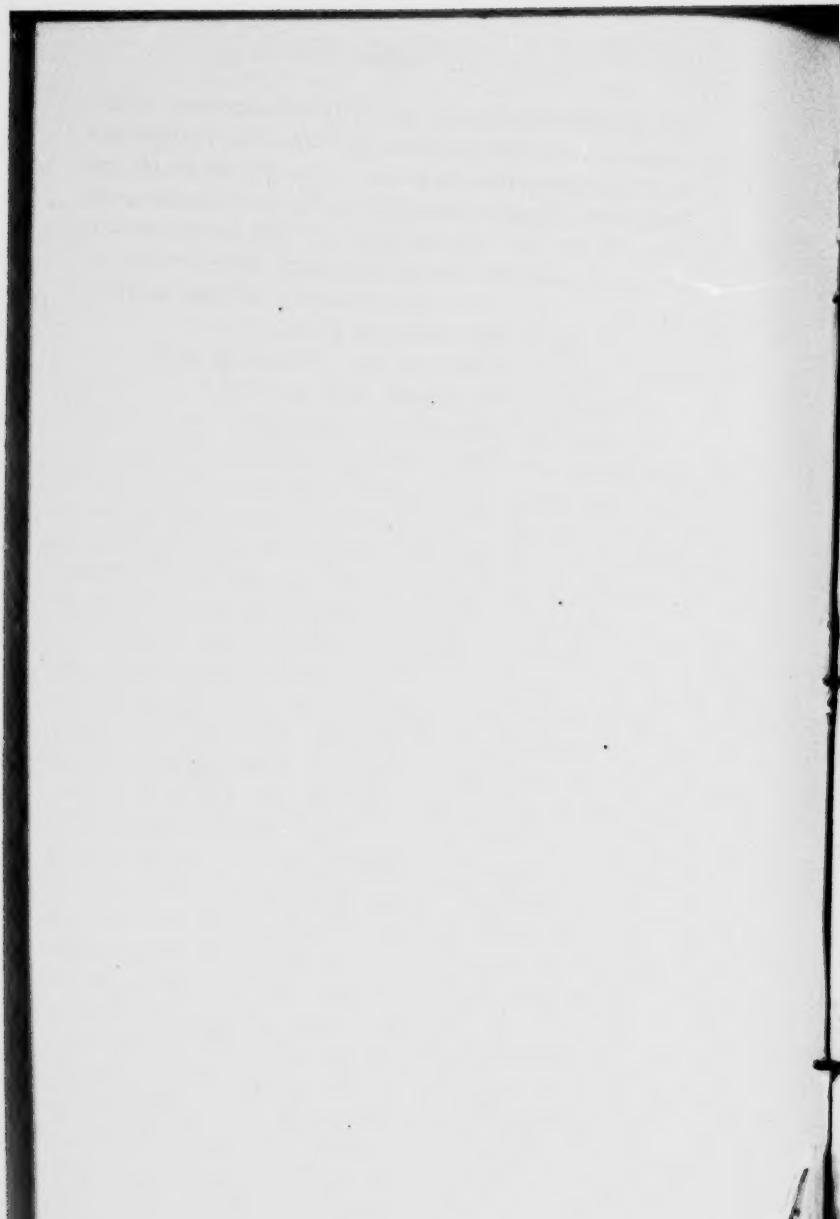
It is a question of federal judicial power.

We maintain that the Government guaranteed the rights of our clients in good faith, and pledged to their protection and their enforcement the whole power of the federal government, legislative, executive, *and judicial*—That pursuant to that pledge it has conferred upon the federal courts the necessary jurisdiction and procedure—That the laws hereinabove set forth were enacted for the express purpose of placing that power in the hands of the federal judiciary, with means of enforcement, as completely as it exists in the executive and legislative branches of the government.

It is incredible to us in the light of the purpose disclosed in the Congressional debates, and of the language of the Statutes enacted, that an outraged citizen of the United States may seek and find redress from the executive or legislative departments, but that department to which is peculiarly entrusted the enforcement and administration of laws for the protection of life, liberty and property is powerless. Until it is announced from the full bench of the Supreme Court, we can never conceive that it will declare to a great throng of outraged federal citizens who apply to it for the protection of federal laws; that although the laws are too plain to be misunderstood; that although the State legislation may be palpably unjust; that although it be defiantly violative of their Civil Rights; that al-

though they may appear both on their face and in the administration unconstitutional, null and void; federal courts are powerless to afford redress; that, so far as federal courts are concerned, outrages by States upon Civil Rights are irremediable. If this indeed be all the power possessed by federal courts, their answer to suitors of this class must be that of the Persian Poet concerning the decrees of Fate:

"The moving Finger writes, and having writ,
"Moves on; nor all your Piety nor Wit
Shall lure it back to cancel half a line
"Nor all your Tears wash out a Word of it."



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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

SELDEN and others against THE BOARD OF STATE CANVASSERS.	No. 190. On Appeal.
JONES and others against THE BOARD OF STATE CANVASSERS.	No. 189. In Error.

Additional Brief on Behalf of Appellants and Defendants in Error.

The reply brief filed on behalf of appellees and defendants was a mortifying surprise from the foot of page 9 to page 13, inclusive. I frankly confess that my brief from pages 83 to 87 is a remarkable production, and my attention had never been called to the jumble of errors on those pages until it was done so by the reply brief. The utter discrepancy between the quotations on page 84 to page 87 inclusive and the authorities cited to support them would be shocking if the errors were not

so multifarious and flagrant as to carry intrinsic conviction of mistake.

With profound apologies to my opponents for the trouble occasioned to them and thanks for the courtesy with which they have referred to the matter, I respectfully ask leave to substitute the following for the last eight lines of page 83 and pages 84, 85, 86 and the first twenty-four lines of page 87 of my brief, where all this confusion has arisen.

No wonder my opponents were puzzled about the citations referred to as from the American & English Encyclopedia of Law. One of them was incorrect and the other was from 25th West Virginia.

The alleged quotation on page 85 from Section 1720 of 2d Spelling was no quotation at all, but my own paraphrase of Spelling, which I intended to use in argument.

The same is true of the alleged quotation on page 87 from Spelling and the alleged quotation on page 85 from Bailey, and the alleged quotations on pages 86 and 87 from High.

This much of explanation is necessary.

All these authorities were studied at the Bar Association Library, some four miles from my office. On one series of slips I made verbatim transcripts from the authorities, of such expressions as I intended to cite. On another series of slips I made paraphrases of some of those expressions, as I thought they should be read in the light of certain decisions.

For example: In High on Extraordinary Remedies, Section 781, I found the expression, "The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but it is also extended to cases where such tribunal, although rightly enter-

taining jurisdiction of the subject matter in controversy, has exceeded its legitimate powers."

Now, having also found the statement, in the American and English Encyclopedia of law, that the use of the writ of prohibition had not been confined in modern practice to writs directed to inferior judicial tribunals, as seemed to be first intended, but that it had been extended to other functionaries, officials and persons, charged with the performance of a duty not wholly judicial and not even very extensively or strongly marked with a judicial character; and having found in 25th West Virginia authority for the proposition that the writ lies not only to inferior judicial tribunals, but to inferior ministerial tribunals, and in extreme cases to purely ministerial bodies; I made, on a separate slip, a paraphrase of the language of Section 781 in High to the effect that "the province of the writ is not necessarily confined to cases where the *inferior* is absolutely devoid of jurisdiction. It extends to cases where the *inferior*, although rightly entertaining jurisdiction of the subject matter in controversy exceeds its legitimate powers."

In the same way and by the same process of paraphrasing and from the same authorities, I took up page 715 of High and paraphrased the language of that section, so as to argue that the writ would not only prevent further prosecution by a court, but by a board, or a person, having no jurisdiction; and to show that it is not only the means by which a superior court could restrain an inferior court, but is also the means by which a superior court may exercise its lawful jurisdiction to restrain an inferior, whether that inferior be a court, or a board, or a person, and prevent the further exercise of unwarranted jurisdiction.

In the same way, looking at the language of 779 in High, in which it is stated "the governing principle in such cases is, that where an inferior court proceeds

in excess of its lawful jurisdiction, it is chargeable," etc., I, in the light of the statement in American and English Encyclopædia of Law that the principle had been extended to other public functionaries, officials and persons charged with the performance of a duty not wholly judicial and not even very extensively or strongly marked with a judicial character; and of the case of Brazie against Commissioners, 25th West Virginia, prepared a paraphrase of Section 779 of High expressing that the governing principle in such cases is, that when an inferior tribunal proceeds in excess of its lawful jurisdiction the writ will run against it, intending to argue from that the extension of the principle announced by High, so as to embrace not only courts but the other tribunals referred to. This discussion was a distinct feature of the brief.

Somehow, when the brief came to be made up and its different points assembled, all these paraphrases crept into my argument as quotations from the books referred to. I do not know how it happened, except that some two months had elapsed, after I studied and made notes on these authorities, before I wrote up the brief, and that all my paraphrases had at the foot of them references to the paragraphs I intended to paraphrase and discuss. It is probable that when I finally made up the brief I mistook these paraphrases for the original extracts made by me from the authorities and put them in as such, and that never having compared them with the books from which they purported to come, I did not discover the error. I am to blame for it and acknowledge my responsibility.

The following should be substituted for the last eight lines of page 83 and pages 84, 85, 86 and the first twenty four lines of page 87 of my brief where all this confusion has arisen, and I beg the court to disregard altogether what is on those pages.

The American and English Encyclopedia of Law, Volume 19 (Old Ed., p. 275), says it was originally "understood to be a writ issuing out of some superior court, directed to the judge and parties of an inferior court. * * * But in practice this writ has subsequently gone beyond this limit and has been used not only to restrain inferior judicial tribunals * * * but has also reached to their collateral proceedings * * * Nor has it been confined entirely to inferior judicial tribunals, as seemed first to be intended. On the contrary, it has been extended to other public functionaries, officials and persons charged with the performance of a duty not wholly judicial, and not even very extensively or strongly marked with a judicial character."

Bailey on Jurisdiction (Ed. of 1899, Sec. 446) says, "The writ lies only where the subordinate tribunal has no jurisdiction at all in the premises, or where, having jurisdiction, some question arises which is not within the power of the Court to decide."

In the case of Brazie v. Commissioners (25 West Va., 213), it was decided as follows: "The writ of prohibition lies from a superior court not only to inferior judicial tribunals, but to inferior ministerial tribunals possessing incidentally judicial powers and known as quasi-judicial tribunals, and also in extreme cases to purely ministerial bodies when they usurp and attempt to use judicial functions.

In that case the court also said that the functions necessarily incident to the duties of a board of that character, in determining the class of matters brought before them, were quasi judicial functions.

Numerous instances in which the writ of prohibition was used against boards of different kinds appeared in the cases cited as follows: Connecti-

cut River Ry. Co. v. County Commrs., 127 Mass., 50; People v. Road Commrs., 3 Hills (South Carolina), 314; Toomer v. London, etc., R. R. Co., L. R., 2 Ex. Div., 450; Great Western R. R. Co. v. Ry. Commrs., L. R., 7 Q. B. D., 182; Great Western R. R. v. Waterford, etc., R. R. Co., L. R., 17 Ch. D., 493.

In Spelling on Injunctions and other extraordinary remedies (Ed. 1901, Vol. 2, Sec. 1744) it is said: "Commissions and other bodies are often vested with judicial powers in the performance of their duties and carrying out the objects of their creation; and where such quasi judicial bodies exceed their judicial powers, or attempt to usurp unauthorized judicial powers prohibition will lie against them. * * * On a similar principle such writ will lie from the judge to the county commissioners assembled in special sessions to ascertain the result of an election, to prevent them from transcending their powers, &c."

The particular powers that were being transcended in the case referred to were that the board was examining witnesses and hearing evidence, but I take it there is no difference in principle between transcending their powers in that respect and in any other respect.

High on Extraordinary Legal Remedies (3d Ed., 1896, page 715) describes the writ of prohibition as a civil proceeding to prevent further exercise of an unwarranted jurisdiction, and High, at Section 778a, expressly declares that it is granted against Boards of County Commissioners to prohibit them from proceeding under a law which is unconstitutional.

In the present case the contention is that the Board of State Canvassers, in conspiracy with the members of the convention and other state officers, was proceeding under a law which was unconstitu-

tional; that it knew the registration was based on a void and unconstitutional ordinance; and that the returns were based on a vote cast under that void registration.

In Bailey on Jurisdiction (Ed. 1899, Sec. 446) the doctrine laid down by High is approved; that is to say, that the writ lies where, although the body prohibited may have jurisdiction of the subject, some question arises which is not within the power of the body to decide.

And the same authority (Sec. 452) refers to the use of the writ in restraining election commissioners from transcending their powers.

High on Extraordinary Remedies (p. 708, Sec. 764a) declares that the appropriate function of the remedy is to restrain the exercise of unauthorized judicial or quasi-judicial power, which is regarded as a contempt of the state or sovereign and which may result in injury to the state, or to its citizens, and that the conditions which warrant the granting of the relief are as follows:

1. That the court, officer or person against whom it is sought is about to exercise judicial or quasi judicial power.

2. That the exercise of such power is unauthorized by law.

3. That it will result in injury for which no other adequate remedy exists.

There can, as it seems to me, be no reasonable doubt, in the light of these authorities, that the remedy may be invoked agalnst any body of persons or officers assuming to exercise judicial or quasi judicial powers, although not strictly or technically a court.

Spelling on Injunctions and other extraordinary remedies (Secs. 17-18), also says: "The writ is sometimes termed a counterpart of mandamus." It is the counterpart in the manner in which it

operates, being negative, while mandamus is positive in its command.

High on Extraordinary Legal Remedies (Sec. 773 and Sec. 779), says that the governing principle in such cases is that where an inferior court proceeds in excess of its lawful jurisdiction, it is chargeable with contempt.

Of course the same language is equally applicable to any inferior judicial or quasi-judicial tribunal.

High also says in Section 781, the province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction; it extends to cases where such tribunal, although rightly entertaining jurisdiction of the subject matter in controversy, has exceeded its legitimate powers.

In view of the extension of the use of the writ of prohibition to proceedings against parties and individuals other than courts, it would be equally proper to say that, the province of the writ is not necessarily confined to cases where the inferior is absolutely devoid of jurisdiction, it extends to cases where the inferior, although rightly entertaining jurisdiction of the subject matter in controversy, exceeds its legitimate powers; and it would also be perfectly proper to add "and to cases in which the inferior is attempting to proceed under a law which is unconstitutional."

The term "inferior" is substituted for the term "subordinate court," as used by High, because the writ, as above pointed out, now often runs to bodies or individuals who are not courts.

Respectfully,

JNO. S. WISE.